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IN THE

Supreme Court of the United States

PANOS T. TSOLAINOS,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Confrontation Clause of the Sixth Amendment, as recently examined by this Court in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), extends to testimonial evidence admitted at a pre-trial hearing to establish a *prima facie* case of conspiracy in order to lay the foundation for admitting "other crimes evidence" at the defendant's second degree murder trial?

2. Whether a police informant's out-of-court testimony in the form of a tape recorded conversation with an alleged co-conspirator constitutes "testimonial" evidence and thus, under *Crawford*, is subject to the Confrontation Clause?

3. Whether, even if a police informant's testimony constitutes "non-testimonial" evidence, this Court should consider the admissibility of non-testimonial evidence, which was left open by *Crawford*, and determine whether the out-of-court testimony of a police informant who is promised compensation by law enforcement for delivering "results" is subject to the Confrontation Clause?

4. Whether the Confrontation Clause permits the admission of an alleged co-conspirator's out-of-court statement when the foundation for its admission, the showing of a *prima facie* case of an alleged conspiracy, is established solely by hearsay evidence and thereafter, at trial for an entirely different crime, the statement is admitted as "reliable" based on that same hearsay evidence, all raising "bootstrapping" and Confrontation Clause implications under this Court's prior decisions, including in *Crawford*; *Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999); *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990); and *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)?

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OPINIONS BELOW

The judgment of the Louisiana Court of Appeal for the First Circuit was unpublished; a copy of the unreported judgment is attached as Appendix A. The court of appeal summarily denied rehearing; a copy of that unreported order is attached as Appendix F. The unreported order of the Louisiana Supreme Court denying review is attached as Appendix G.

STATEMENT OF JURISDICTION

The Louisiana Court of Appeal for the First Circuit issued its judgment on December 31, 2003 and summarily denied petitioner's timely petition for rehearing on February 9, 2004. The Louisiana Supreme Court denied petitioner's timely petition for review on July 2, 2004. This Court has jurisdiction under 28 U.S.C. § 1257(a) on the basis that petitioner's rights under the Sixth Amendment of the United States Constitution have been violated.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution, applicable by the Fourteenth Amendment, provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

STATEMENT OF THE CASE

Panos Tsolainos, the defendant here, was convicted of second degree murder for the death of his ex-wife who was tragically killed in a car accident in the couple's driveway while Mr. Tsolainos was driving. The State's entire case of proving Mr. Tsolainos had the requisite intent to kill consisted of hearsay testimony that Mr. Tsolainos purportedly conspired previously to kill Mrs. Tsolainos by hiring a hit man. Despite Mrs. Tsolainos' death having no resemblance whatsoever to the alleged conspiracy (and the State later dropping all conspiracy charges against Mr. Tsolainos), the trial court admitted the "conspiracy testimony." More egregious, which is the subject of this writ application, the trial court denied Mr. Tsolainos his Sixth Amendment Constitutional right, over his objections, to confront the declarants of that hearsay testimony.

Those declarants/witnesses included: (1) Mr. Tsolainos' daughter who pled the Fifth Amendment privilege against self-incrimination; (2) a confidential police informant who committed suicide before trial; and (3) an alleged co-conspirator who pled the Fifth Amendment. The out-of-court testimony of the first witness — Mr. Tsolainos' daughter — was in the form of a taped statement she gave to the police during interrogation.[1] The out-of-court testimony of the other two witnesses — the police informant and the alleged co-conspirator — was in the form of a tape recorded conversation and a police officer's testimony repeating that out-of-court conversation.[2] The trial court admitted all of this out-

1. Introduced by the State as Exhibit S-3 at the *Prieur* Hearing on September 13, 1999.

2. Trial Exhibit S- 51, 54, 55.

of-court testimony at a pre-trial hearing where the State sought to establish a *prima facie* case of conspiracy so it could lay the foundation for introducing this same testimony at the defendant's second degree murder trial. Having found it laid the appropriate foundation, the trial court also admitted the police informant's and the alleged co-conspirator's testimony at trial. While the State did not seek to introduce the daughter's statement at trial, the trial court allowed the investigating officer to refer to the daughter's statement during trial and to testify that he relied on that statement in arresting Mr. Tsolainos.[3]

Deciding this case before this Court's ruling in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), and specifically relying on the "reliability" test in the now-overruled *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), the Louisiana court of appeal affirmed the trial court's admission of these out-of-court statements. The state courts' decisions now clearly conflict with this Court's analysis in *Crawford*. *Crawford* makes clear that a defendant has the absolute right at trial to confront witnesses who give statements to the police during interrogation; otherwise, those "testimonial" statements are inadmissible. *Crawford* also makes clear that the reliability test set forth in *Roberts* no longer governs the admissibility of hearsay testimony. This case presents the opportunity for this Court to consider, in the context of the daughter's statement, whether the Confrontation Clause also prohibits the admission of "testimonial" evidence at pre-trial hearings, the sole purpose of which is to lay the predicate for introducing otherwise inadmissible evidence at trial. This case also presents the opportunity for this Court to consider further, in the context

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3. Record Volume XVI, pages 1485-1490.

of the police informant's and alleged co-conspirator's testimony, what constitutes "testimonial evidence" and the propriety of admitting highly suspect "non-testimonial" evidence in contravention of the Confrontation Clause, both issues left open by this Court in *Crawford*.

Evidence at Trial

Mr. and Mrs. Tsolainos were married for approximately ten years. When they married, Mr. Tsolainos adopted her two minor children, Clarissa and Melissa. Mr. and Mrs. Tsolainos later had two children of their own, Stephen and Stephanie. It was at the time Stephanie was born that the Tsolainos' marriage began to deteriorate. Mrs. Tsolainos had a substance abuse problem and Stephanie was born a "heroin baby." Despite Mr. Tsolainos' efforts to have Mrs. Tsolainos stop and to keep their marriage together, Mrs. Tsolainos's drug use increased. Mr. Tsolainos eventually had no choice but to divorce Mrs. Tsolainos. Mr. Tsolainos was awarded custody of the children and to protect them, a TRO was entered prohibiting her from contact with the children. In addition to taking care of their children, Mr. Tsolainos worked full time running a local shipping company. Mrs. Tsolainos, on the other hand, left Louisiana and returned to her home town of St. Louis, Missouri. Mrs. Tsolainos eventually began to call. Although the TRO prohibited Mrs. Tsolainos from contacting the children, Mr. Tsolainos allowed her to speak with the children and later to visit them. On one occasion however, Mrs. Tsolainos initially refused to return the children after her visit, but later complied.

Due to the stress of these circumstances, Mr. Tsolainos began using drugs himself for a few months. While under the influence of drugs, he had a conversation with Gerald

Branigan ("Mr. Branigan"), from whom he purchased drugs. Having told Mr. Branigan of the problems with his ex-wife, Mr. Branigan offered to get her out of the way. Mr. Tsolainos regretted the conversation immediately and never took any steps to pursue it and avoided Mr. Branigan. Mr. Branigan however was very interested in getting money from Mr. Tsolainos and so continued to pursue him. Mr. Branigan also solicited the involvement of Charles "Tinker" Schmolke ("Mr. Schmolke"). Mr. Schmolke was a confidential informant for the local sheriff's office which promised him payment for "results."[4]

Testimony of Detective Scallan:

Q: Did you have any concerns at any time with providing contingent payments to informants that might cause them to cross the line?

A: All the time.

Q: In this case, Mr. Schmolke was going to be paid on a contingency basis wasn't he? No results, no pay?

A: There was no guarantee that he was going to be paid.

Q: You didn't promise to pay him? You didn't tell him he would be compensated?

A: I told him I would compensate him I didn't promise him anything. I said I could compensate you, but I have no idea what it would be.

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4. R. Vol. XIII pp. 3018-3021, 3024, 3080-3087, 3100-3102.

Q: I didn't ask you how much. The questions was: Did you promise to pay him?

A: I didn't say, I promise I'll pay you, no.

Q: Did you think there was a distinction to be made between saying I'll compensate you and I promise to pay you.

A: I didn't pay him.

Q: You didn't pay him did you?

A: No.

Q: But you told him you would?

A: I said he could be compensated, yes.[5]

Q: Well, let me get this straight.

A: I don't have to pay anyone.

Q: You don't have to keep your word?

A: No.[6]

Detective Scallan also testified at trial that he knew Mr. Schmolke was drunk, a brawler, and inherently unstable:

> Didn't know Branigan, but from Tinker [Schmolke] I can safely assume, knowing the type of person Branigan was, he was pretty much like

5. R. Vol. X, p. 1409.

6. *Id.* at pp. 1409-1410.

> Tinker, that they're drunk, they're always loaded, and they could beat each other up in one minute and they would be hugging and kissing each other the next minute. And that's how Tinker was.[7]

Nevertheless, working at the direction of Det. Scallan, Mr. Schmolke set up a meeting with Mr. Branigan so that Det. Scallan could tape record the conversation. Det. Scallan also took partial notes of the conversation between Mr. Branigan and Mr. Schmolke, which was inaudible at times because of poor wire transmission, and later supplemented those notes from a de-briefing with Mr. Schmolke. Det. Scallan later arranged to have Mr. Schmolke meet again with Mr. Branigan and then a third time with Mr. Branigan and Melissa Tsolainos ("Melissa"). Det. Scallan attempted to record both of those conversations but those tapes showed up blank at trial.

Based on those conversations, Detective Juge of the local sheriff's department arrested Mr. Branigan and Melissa for conspiracy to commit first degree murder. During interrogation, Det. Juge obtained statements from both Mr. Branigan and Melissa. Det. Juge then arrested Mr. Tsolainos. Felony Bill of Information, Attached as Appendix E.

While he was in jail for conspiracy, Mrs. Tsolainos used the opportunity to re-gain custody of their children and the family home in Louisiana. When he was released from jail, and as a condition of his bond, Mr. Tsolainos agreed to a consent TRO keeping him from contact with Mrs. Tsolainos. Mrs. Tsolainos however contacted Mr. Tsolainos several days after he was released from jail and told him that he needed

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7. R. Vol. X, p. 1418.

to remove certain belongings from the family home or they would be thrown out the next day. Mr. Tsolainos and his girlfriend Connie Deville ("Ms. Deville") drove to the family home. To comply with the TRO, Ms. Deville dropped Mr. Tsolainos off 400 feet from the house and drove up to the house alone. Mr. Tsolainos stayed away from the house while Ms. Deville loaded up the car. On her own accord, Mrs. Tsolainos brought Stephen and Stephanie down the street to see their father. The visit was pleasant and Mr. Tsolainos and Ms. Deville left to unload the car.

Mr. Tsolainos and Ms. Deville returned later to pick up the remaining items. They used Mrs. Deville's mother's car, a 1993 Buick Skylark with a unique gear shift/windshield wiper configuration. The gear shift and the windshield wiper control were on the same side of the steering column, were remarkably similar in appearance, and were placed close together and operated in the same up and down fashion. That entire day, unfamiliar with the car, Mr. Tsolainos confused the two levers, a chronic problem with the car. When Mr. Tsolainos and Ms. Deville returned to the house, Ms. Deville again dropped Mr. Tsolainos off, this time for him to walk up to the house to make sure they could retrieve the rest of the belongings. Once Mrs. Tsolainos agreed, Ms. Deville drove the car up the driveway. The entire visit was again very amicable until Mr. Tsolainos and Ms. Deville began to leave.

While Mr. Tsolainos was saying good-bye, Stephanie (then three) wanted to leave with him; she knew him far better than her mother. Mrs. Tsolainos turned to Mr. Tsolainos and said "You used to be a good father - you can be a good father again." Mr. Tsolainos replied that he was not the one who had put the children in harms way. Mrs. Tsolainos then

erupted. Mrs. Tsolainos began screaming profanities, banging on the hood of the car, and advancing in Ms. Deville's direction. According to the Coroner, Mrs. Tsolainos' toxicology test results showed a blood alcohol level of .07 and, in his opinion, Mrs. Tsolainos consumed four to five beers within an hour of the accident. Clarissa, who was also at the house, admitted during a later motion for new trial that, contrary to her trial testimony, Mrs. Tsolainos (her mother) was drinking heavily that day.

Mr. Tsolainos and Ms. Deville attempted to leave as fast as they could. Mr. Tsolainos climbed into the driver's seat, which Ms. Deville had adjusted closer to the steering wheel when she drove the car to the house. Mr. Tsolainos started the car quickly, but in the confusion and because of the unique layout of the car's controls, he inadvertently turned on the windshield wipers instead of putting the car in reverse. After finding the gear shift and putting the car in reverse, he quickly accelerated. The car lurched backwards causing Ms. Deville, who was not completely in the passenger seat, to fall out of the car. Mr. Tsolainos stopped the car.[8]

According to Mr. Tsolainos and Ms. Deville, Mrs. Tsolainos then climbed over the hood of the car and began beating on the windshield at Mr. Tsolainos.[9] Mr. Tsolainos

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8. R. Vol. XII, XIII, pp. 2944, 2959-2162, 3056-3060.

9. R. Vol. XII, XIII, pp. 2945, 2963, 3059-3064. Clarissa testified at trial that Mr. Tsolainos directed the car at Mrs. Tsolainos and hit her in the stomach, instead of Mrs. Tsolainos' rolling off the car as Mr. Tsolainos and Ms. Deville testified. The Coroner however contradicted Clarissa's testimony because he found no injuries to Mrs. Tsolainos' mid-section consistent with impact from an automobile. (Cont'd)

focused on slapping at the lever for the windshield wipers to turn them off. With his legs cramped against the pedals and thinking Ms. Deville was back in the car, Mr. Tsolainos accelerated. The car, however, went forward instead of backwards because he had accidentally shifted it from reverse to drive while slapping at the windshield wiper lever, a syndrome called "control misapplication."[10] Mrs. Tsolainos was carried with the car 50-60 feet (not unusual in "control misapplication" which causes "hyper-vigilance," in other words, hitting the gas pedal repeatedly thinking it is malfunctioning by causing the car to go forward instead of backwards). In a freak accident, Mrs. Tsolainos fell off the car as it hit a tree and became pinned between the tree and the passenger side of the car which came down on top of her. Despite his efforts, Mr. Tsolainos was unable to get the car off of her and she died.

Procedural History

On August 13, 1998, an Indictment was filed charging Panos Tsolainos with First Degree Murder for the killing of Deborah Tsolainos on July 19, 1998 in violation of La. R.S. 14:30. Attached as Appendix D. That Indictment was amended on April 26, 1999 reducing the charges against Mr. Tsolainos to Second Degree Murder in violation of La. R.S. 14:30.1.

(Cont'd)

(R. Vol. X, IX, XII, pp. 2176-2178; 2214-2219, 2449, 2952, 2958). Clarissa also admitted under oath at a new trial hearing that she lied at trial regarding Mrs. Tsolainos' alcohol consumption and also that she promised her boyfriend, George Deforrest, $20,000 or a new truck for his trial testimony. (R. Vol. XVI, pp. 2201, 3662, 3670). Clarissa and Mr. Forrest were the key witnesses for the State at trial.

10. T. Exh. T-29-E, T-30-E, T-31.

Prior to trial, Mr. Tsolainos filed a request for notice of the State's intent to use evidence of other crimes, wrongs, or acts against him at trial pursuant to La. Code of Evidence Art. 404(B)(1).[11] The State in response notified the Defense of its intent to use at trial evidence that Mr. Tsolainos "conspired with others to commit the crime of first degree murder buy [sic] placing a contract killing on his ex-wife, Debbie Tsolainos. . . ."[12] The alleged conspiracy evidence included: (1) Melissa's statement given to the police regarding the alleged conspiracy; (2) three tapes – the two purported tape recorded meetings between police informant Mr. Schmolke and alleged co-conspirator Mr. Branigan and the third purported tape recorded meeting involving those individuals and Melissa; (3) Det. Scallan's typed "police resume" from partially overhearing the first tape recorded meeting and from his conversation with Mr. Schmolke following that meeting as well as Det. Scallan's testimony regarding all three meetings, and (4) Mr. Tsolainos' statement given to the police after his arrest for conspiracy in which he admitted speaking to Mr. Branigan but denied pursuing anything further.[13] The State sought to use this "conspiracy evidence" to show that Mr. Tsolainos intended to kill Mrs. Tsolainos when she was hit by the car; specific intent is a necessary element of second degree murder.

Mr. Tsolainos opposed the State's use of this evidence because, among other reasons, the evidence was hearsay not subject to cross-examination: "Mr. Schmolke is deceased and Mr. Branigan and Melissa have invoked their privileges against self-incrimination. As both the United States Supreme

11. R. Vol. I, p. 235.

12. R. Vol. I, p. 238.

13. T. Exh. S-58.

Court and ours have held; denial of the right of effective cross-examination is a constitutional error of the first magnitude."[14] Mr. Tsolainos also objected to the State's refusal to prosecute Mr. Branigan and Melissa on the conspiracy charges first, before his own trial of second degree murder, which thereby deprived Mr. Tsolainos of his right to cross-examine those witnesses. And, Melissa was in fact later found not guilty of those charges a mere few weeks after Mr. Tsolainos' instant trial; the charges of conspiracy were dropped against Mr. Tsolainos.[15]

The trial court denied Mr. Tsolainos' objection to the State's refusal to prosecute Mr. Branigan and Melissa first. Following a hearing, the trial court granted the State's request to use the conspiracy evidence at trial.[16] The trial court found that the State proved both an agreement and an overt act, the necessary elements to establish a *prima facie* case of conspiracy. According to the trial court, the "agreement" was Mr. Tsolainos' meeting with Mr. Branigan and the "overt act" was Mr. Branigan's soliciting Mr. Schmolke. The trial court therefore concluded that all four individuals – Mr. Tsolainos, Melissa, Mr. Branigan and Mr. Schmolke – were co-conspirators so their out-of-court testimony was admissible as co-conspirator statements under La. Code Evidence Art. 801(D)(3)(b). Mr. Tsolainos sought immediate appellate review of that decision, which was denied by the court of appeal.[17] Mr. Tsolainos then sought immediate review

14. R. Vol. II, p 265.

15. The Louisiana First Circuit Court of Appeal in its Opinion noted that Melissa was acquitted at her trial. (Attached as Appendix A, page 23a, note 4).

16. R. Vol. II, p. 301.

17. R. Vol. II, p. 340.

by the Louisiana Supreme Court, which also denied review.[18]

On the morning of trial, Mr. Tsolainos moved the trial court to reconsider its ruling on the admissibility of the conspiracy evidence, which the trial court denied.[19] During trial, Mr. Tsolainos again objected to the introduction of this evidence. The trial court, while initially allowing Det. Scallan to testify about the second and third tape recordings, eventually held they were inadmissible because the tapes were both blank. Despite allowing the jury to hear Det. Scallan's testimony which it later ruled inadmissible, the trial court denied Mr. Tsolainos's motion for mistrial and instead instructed the jury to disregard Det. Scallan's testimony regarding those meetings.[20] The trial court, over Mr. Tsolainos' continued objection, however allowed the State to introduce the first tape recorded meeting between Mr. Schmolke and Mr. Branigan. The trial court now admitted Mr. Schmolke's testimony for a different reason than it expressed at the pre-trial hearing. Recognizing its previous error in finding Mr. Schmolke was a co-conspirator, because he was a police informant, the trial court admitted his testimony this time on the basis that it was not hearsay because it was not offered for its truth but only to put Mr. Branigan's testimony in context.[21] The trial court also over Mr. Tsolainos' objection permitted the State to introduce

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18. R. Vol. II, p. 355.

19. R. Vol. II, V, pp. 344, 1062-66.

20. R. Vol. X, pp. 2276-2279, 2295-2299, 2468-2470.

21. R. Vol. X, p. 2275. Even the Louisiana First Circuit Court of Appeal in its Opinion duly noted that Mr. Schmolke was not a co-conspirator. (Attached as Appendix A, p. 67a-68a).

during trial Det. Scallan's notes and testimony regarding the first meeting.[22] The State did not introduce Melissa's statement at trial but the court allowed Detective Juge to refer to her statement in his testimony, including that it formed the basis for arresting Mr. Tsolainos on the conspiracy charges.

Mr. Tsolainos was convicted of second degree murder. He was sentenced to life in prison. See Verdict of the Jury, attached as Appendix C, and Minutes from the Sentencing, attached as Appendix B.

Mr. Tsolainos filed several motions for new trial, which the trial court denied. Mr. Tsolainos then appealed his conviction which the Louisiana Court of Appeal for the First Circuit affirmed on December 31, 2003. The court of appeal affirmed the trial court's finding of a *prima facie* case of conspiracy. The court of appeal agreed with the trial court that the "agreement" was Mr. Tsolainos' meeting with Mr. Branigan and the "overt act" was Mr. Branigan contacting Mr. Schmolke, but confusing the agreement stage with overt acts, the court of appeal also stated that "agreeing on a price, working out a method by which defendant could let Branigan know if it were safe for him to return to St. Tammany Parish, [and] agreeing to furnish a photograph of Deborah Tsolainos to Branigan" also constituted overt acts.[23] Although Mr. Tsolainos' statement never references Mr. Branigan's

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22. R. Vol. VII, pp. 1534-1545. Det. Scallan's handwritten notes appeared for the first time on the morning of trial and was the first and only evidence alleging Melissa was actively involved in the conspiracy.

23. The Louisiana First Circuit Court of Appeal Opinion attached as Appendix A, page 64a.

meeting with Mr. Schmolke, the court of appeal further stated that Mr. Tsolainos' statement alone supported the existed of the conspiracy and the recorded conversation of Mr. Schmolke and Mr. Branigan bolsters it.

After affirming the trial court's finding of a *prima facie* case of conspiracy, and based on the same reasons as the trial court, the court of appeal then affirmed the trial court's admission of Mr. Schmolke's and Mr. Branigan's testimony at trial. The court of appeal however did not address the admissibility of Melissa's statement at all. On the critical Sixth Amendment issue, the court of appeal, despite writing a 69 page opinion, merely stated that this Court "resolved the relationship between the rules of evidence and the Confrontation Clause" in *Ohio v. Roberts* and then summarily concluded: "From our review of the record, we find the contested statement in the instant case was a co-conspirator's statement with referential 'indicia of reliability.' Thus, its admission into evidence was not a violation of the Confrontation Clause." Opinion attached as Appendix A, at page 69a, quoting *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). The court of appeal conducted no analysis whatsoever and did not even articulate which of the three witnesses' statements it was addressing. Mr. Tsolainos moved for rehearing, which was denied by the court of appeal on February 9, 2004.

On March 8, 2004, this Court decided *Crawford v. Washington*, 124 S. Ct. 1354 (2004). On March 10, 2004, specifically citing this Court's decision in *Crawford*, Mr. Tsolainos sought review by the Louisiana Supreme Court. Mr. Tsolainos pointed out that this Court overruled *Ohio v. Roberts*, upon which the court of appeal specifically relied, and now made clear that the Sixth Amendment guarantees a

defendant the right to cross-examine all testimony admitted against him. For that principal reason, Mr. Tsolainos urged the Louisiana Supreme Court to exercise its discretionary jurisdiction and correct the erroneous decisions of the lower courts. The Louisiana Supreme Court denied Mr. Tsolainos' request for review on July 2, 2004.

REASONS FOR GRANTING THE PETITION

A. This Court should determine whether the Confrontation Clause applies to "testimonial" evidence submitted at pre-trial hearings which form the basis for introducing otherwise inadmissible evidence at trial.

The admission of Melissa's statement at trial would have clearly violated Mr. Tsolainos' Sixth Amendment rights. *Crawford* is on point on that issue.

In *Crawford*, the defendant's wife gave a statement to the police but later refused to testify at trial by invoking her right under the state's marital privilege. Despite the defendant's inability to cross-examine her at trial, the state court admitted the wife's statement on the basis that it was reliable. This Court reversed. "Where testimonial evidence is at issue, . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." *Crawford*, 124 S. Ct. at 1374. The wife's statement to the police constituted "testimonial evidence." "Whatever else the term ['testimonial'] covers, it applies at a minimum to prior testimony at a preliminary hearing before a grand jury, or at a former trial; and **to police interrogations**." *Id.* (emphasis added). Because the State admitted the wife's "testimonial statement against petitioner, despite the fact that he had no opportunity to cross examine her," this Court held

"[t]hat alone is sufficient to make out a violation of the Sixth Amendment." *Id.* at 1374.

Here, Mr. Tsolainos' daughter Melissa gave a statement to the police, but asserting her Fifth Amendment right, she later refused to testify. The trial court nevertheless admitted Melissa's statement at the pre-trial hearing and allowed Det. Juge to refer to her statement at trial on the basis that it was a co-conspirator's statement under La. Code Evidence Art. 801(D)(3)(b). Despite the trial court's ruling, Melissa's statement clearly was not a co-conspirator's statement under 801(D)(3)(b) because it was not a statement given in furtherance of a conspiracy, but rather a statement given to the police during interrogation. The court of appeal, of course, did not address the admissibility of Melissa's statement at all and when discussing the Sixth Amendment issue, it did not specify to which statement it was referring when it found "*the* contested statement" was a "co-conspirator's statement with referential 'indicia of reliability.'" To the extent the court of appeal was addressing Melissa's statement, it apparently realized her statement was not in furtherance of the alleged conspiracy, and thus not admissible under article 801, because the court of appeal determined, albeit conclusory, that the statement was reliable under *Ohio v. Roberts*. Regardless of the lower courts' various decisions, *Crawford* makes clear that Melissa's statement was "testimonial" evidence and that the Sixth Amendment guarantees Mr. Tsolainos the absolute right to confront all testimonial evidence against him. Because Det. Juge referred to Melissa's statement at trial and testified that he relied on it in arresting Mr. Tsolainos, Mr. Tsolainos was denied his Constitutional right to confront all testimonial evidence against him.

To the extent Det. Juge's trial testimony alone, rather than the admission of Melissa's statement at trial, would not violate Mr. Tsolainos' Sixth Amendment right, this Court should consider whether *Crawford* extends to testimonial evidence admitted at pre-trial hearings. The results of pre-trial hearings generally form the foundation for the admissibility of evidence at trial and in fact did so in this case. The State used Melissa's statement, which would be inadmissible at trial under *Crawford*, at a pre-trial hearing to prove a *prima facie* case of conspiracy so that it could introduce at trial other alleged conspiracy evidence which, without the *prima facie* foundation, would also be inadmissible at trial. If *Crawford* does not extend to pre-trial motions, the State could do (and would be encouraged to do) through pre-trial motions what it cannot do at trial. In the end, Melissa's statement was testimonial evidence used against Mr. Tsolainos in a criminal proceeding; that should raise the exact same concerns where this Court in *Crawford* countenanced "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 1374. Mr. Tsolainos was denied that Constitutional right.

B. This Court should determine whether a police informant's out-of-court testimony constitutes "testimonial" evidence and thus, under *Crawford*, is subject to Confrontation Clause scrutiny.

The tape recorded conversation of Mr. Schmolke and Mr. Branigan arguably does not fall within *Crawford*'s minimal definition of "testimonial evidence." However, to allow the introduction of a police informant's testimony in this context, without cross-examination, is tantamount to the

same sacrosanct violation of the Sixth Amendment which concerned this Court in *Crawford.*

This Court defined "testimonial evidence" in *Crawford* as including *at a minimum* prior testimony before a grand jury or at a former trial and statements made during police interrogations. Although leaving "for another day any effort to spell out a comprehensive definition of 'testimonial,'" this Court highlighted the concerns of the Framers and their design for the Confrontation Clause.

> Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout the history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

Id. at n.7.

This Court also rejected the reasoning that the Sixth Amendment does not apply where the law enforcement questioner is neutral and not inclined to advance the declarant's interest or to shade the truth unfavorably against the defendant, which was a basis the trial court in *Crawford* found the wife's statement "reliable."

> The Framers would be astounded to learn that *ex parte* testimony could be admitted against a

> criminal defendant because it was elicited by "neutral" government officers.

Id. at 1373.

All of these same concerns are magnified in Mr. Tsolainos' case. Here, you have a police informant working directly with law enforcement for the sole purpose of "the production of testimony with an eye toward trial." Additionally, under no stretch of the imagination could you even consider Mr. Schmolke's intent "neutral." The police not only promised Mr. Schmolke compensation but only for producing results. His goal therefore was to obtain incriminating testimony. Moreover, the testimony at issue here is Mr. Schmolke's himself, not the testimony of someone he is eliciting, like Mr. Branigan whose testimony is discussed separately below. In other words, the trial court admitted the highly prejudicial out-of-court testimony of a police informant whose sole purpose was to provide incriminating testimony for a prospective criminal trial against Mr. Tsolainos and who had an incentive to ensure that his testimony was full-proof to convict Mr. Tsolainos.

If, as this Court stated in *Crawford*, the Framers would be astounded by the admission of out-of-court testimony elicited by "neutral" government officers, the Framers would roll over in their graves to learn that *ex parte* testimony of a police informant who gets paid for results could be admitted without cross-examination. Review by this Court would resolve this issue and provide further guidance as to what constitutes "testimonial evidence" requiring cross-examination under the Sixth Amendment.

C. Even if a police informant's testimony constitutes "non-testimonial" evidence, this Court should consider whether the Confrontation Clause imposes an absolute bar to police informant testimony absent a prior opportunity for cross-examination.

This Court noted in *Crawford* that it was presented with two proposals: (1) applying the Confrontational Clause only to testimonial statements, leaving the remainder to regulation by hearsay law; or (2) imposing an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examination. *Id.* at 1370. This Court adopted the second proposal, and while recognizing that it rejected the first proposal in *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 737, 116 L. Ed. 2d 848 (1992), this Court did not need to reach the first proposal in *Crawford*. *Id.* This case makes the first proposal, or its continued *per se* rejection, ripe for consideration.

The trial court here admitted Mr. Schmolke's testimony at trial on the basis that it was not hearsay because it was not offered to prove the truth of his statements but only to put Mr. Branigan's testimony in perspective. The court of appeal apparently affirmed the admission of his testimony because it found it "reliable." The trial court's and court of appeal's reasoning, albeit perhaps differing ones, is precisely what concerned this Court in *Crawford*.

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability."

Id. at 1370.

Because *ex parte* evidence is "non-testimonial" instead of "testimonial," should the "vagaries of the rules of evidence" or the "amorphous notions of 'reliability'" prescribe a defendant's Sixth Amendment constitutional right? The problems associated with doing so are highlighted here. The trial court originally admitted Mr. Schmolke's testimony on the basis that he was a co-conspirator; it later admitted it on the basis that it was not hearsay. Considering the trial court's revolving bases, it would be more apt to question here whether the amorphous notions of the vagaries of the rules of evidence determine a defendant's Constitutional right to cross-examine witnesses against him.

With respect to the court of appeal, to the extent it was addressing Mr. Schmolke's testimony, it apparently found Mr. Schmolke's testimony reliable despite that he was a police informant being paid by the police for results or that the investigating officer using Mr. Schmolke personally knew he was a drunk, a brawler, and unreliable. Mr. Schmolke was also so unstable that he committed suicide shortly before trial. Moreover, evidence not available at the time of trial, but presented at a motion for new trial and which was before the court of appeal, revealed the following about Mr. Schmolke: the police agreed to help Mr. Schmolke and his girlfriend with pending criminal charges in exchange for Mr. Schmolke's acting as an informant in this case; Mr. Schmolke had a chronic drug use and criminal history beyond that revealed by the State prior to trial; Mr. Schmolke was related to members of the local sheriff's office; Mr. Schmolke was "high" when he tape recorded the conversations with Mr. Branigan; Mr. Schmolke had been arrested for beating up Mr. Branigan three days before Mr. Tsolainos was arrested for conspiracy; and Mr. Schmolke

was well-known by a juror, who was his neighbor, which the juror concealed at trial.[24]

The court of appeal's "amorphous, if not entirely subjective," notion of reliability, especially in a case with such incredibly suspect testimony, is exactly the reason that this Court imposed an absolute right to cross-examination in *Crawford*.

> The legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide a meaningful protection from even core confrontation violations.

Id. at 1371.

Moreover, what must be kept firmly in mind in this case is that the State did not introduce the hearsay statements of Mr. Schmolke and Mr. Branigan at trial to prove the alleged conspiracy which, by any logical measure, was discontinued (if it ever existed) with the arrest of Messrs. Brannigan and Tsolainos and Melissa Tsolainos. Rather, the State offered the hearsay statements to prove Mr. Tsolainos' state of mind three weeks later with respect to a death which bore no factual or legal similarity to the alleged conspiracy. In admitting the tape, the courts below myopically focused solely on that conversation without consideration for Mr. Tsolainos' inability to confront those witnesses regarding his state of mind during the critical three week period which followed. The recording, to which Mr. Tsolainos played no part, also

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24. R. Vol. II, III, pp. 497-537.

attributes highly prejudicial comments to him regarding the conspiracy, yet Mr. Tsolainos again was unable to cross-examine those witnesses on those comments which were used later at his second degree murder trial for a completely different purpose. This dichotomy in time and context also raises serious questions about courts' individualized applications of a "reliability" exception to the Confrontation Clause.

This Court can make clear that the general reliability exception in *Roberts* no longer survives *Crawford*, even as to non-testimonial evidence. This Court can also make clear that a police informant's testimony, regardless of any evidentiary semantics, cannot under any circumstances circumvent Sixth Amendment scrutiny.

D. This Court should consider whether an alleged co-conspirator's statement, which is premised solely on a hearsay foundation and is so inherently suspect, is nevertheless admissible without cross-examination simply because it might satisfy Code of Evidence article 801(D)(3)(b).

The State's "evidence" of the conspiracy in this case of second degree murder was dependant entirely on Messrs. Branigan and Schmolke's tape recorded conversation, Mr. Schmolke's comments to Det. Scallan, and Melissa's and Mr. Tsolainos' statements to the police. All of this testimony was hearsay, except perhaps Mr. Tsolainos' statement. His statement alone however was insufficient as a matter of law to establish a *prima facie* case of conspiracy because, at best, it could only show an "agreement." The trial court in fact found the "overt act" was Mr. Branigan's solicitation of Mr. Schmolke, which, not only was nowhere in Mr. Tsolainos'

statement, but Mr. Tsolainos was not aware of the solicitation and it could only be proved through Det. Scallan's testimony of uncorroborated statements made to him by Mr. Schmolke himself. While the court of appeal found additional overt acts of "agreeing on a price," "working out a method," and "agreeing to furnish a picture," and attributed these at least in part to Mr. Tsolainos' statement, those constituted part of the "agreement" stage and were not "overt acts." Overt acts would be the payment of money, obtaining something in furtherance of the method, or furnishing a picture. Not only did none of that occur, but they are nowhere in Mr. Tsolainos' statement. In the end, the only testimony to support an overt act – Mr. Branigan soliciting Mr. Schmolke – was through comments made by Mr. Schmolke to Det. Scallan. Thus, based on hearsay evidence alone, and without any opportunity for Mr. Tsolainos to cross-examine those witnesses, the lower courts found the elements for a *prima facie* case of conspiracy existed.

With that foundation, the trial court then admitted that same hearsay evidence at trial based on various evidentiary grounds, which again denied Mr. Tsolainos any opportunity to cross-examine those witnesses. In the case of Mr. Schmolke's testimony, the trial court held it was not hearsay and so was admissible without cross-examination. With respect to Mr. Branigan's testimony, the trial court held it was a co-conspirator's statement and thus was admissible without cross-examination under article 801(D)(3)(b). The trial court also used its finding of a *prima facie* case of conspiracy as the basis for admitted Mr. Tsolainos' statement, which was highly prejudicial and otherwise would have been inadmissible. The court of appeal affirmed the trial court's admission of Mr. Schmolke's and Mr. Branigan's testimony on the same evidentiary grounds and found no Confrontation Clause violation because "the statement" was reliable.

Accordingly, these lower courts' decisions hold for the first time that a criminal conspiracy may be proved entirely by hearsay evidence. This Court has never extended Federal Rules of Evidence article 404 to that extent, *Bourjaily v. United States*, 483 US 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) and, until this case, no Louisiana court had allowed it. *Tritt v. Gares*, 733 So. 2d 659 (La. App. 4 Cir. 1999).

The court of appeal's decision below also for the first time permits the reliability, and thus the admission, of out-of-court statements to be determined based on other hearsay testimony. This Court has specifically stated that "hearsay evidence used to convict a criminal defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho v. Wright*, 497 U.S. 805, 822, 110 S. Ct. 3139, 3150, 111 L. Ed. 2d 638 (1990). In other words, this Court refused to allow the state to "bootstrap" on other evidence to establish the admissibility of an incriminating hearsay statement which the Confrontation Clause would otherwise deem inadmissible. *Id.* at 823, 110 S. Ct. at 3150. In *Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999), this Court's plurality opinion again rejected the contention that a non-testifying accomplice's confession was reliable in part because it was corroborated by the accounts of other witnesses and the accounts of another accomplice's trial testimony. This Court specifically held that because "other evidence at trial corroborates portions of [an accomplice's] statement is irrelevant." *Lilly*, 527 U.S. at 137, 119 S. Ct. at 1900.

The lower courts here have engaged not in single bootstrapping but in double bootstrapping, and all with hearsay testimony involving a completely separate alleged

offense. Melissa's statement and Mr. Schmolke's testimony, because in no circumstances could they qualify as co-conspirators' statements under Art. 801, were first bootstrapped on one another and perhaps with Mr. Branigan's testimony (and Mr. Tsolainos' statement) so that they could be deemed reliable and admitted to prove a *prima facie* case of conspiracy. After the initial bootstrapping to lay the *prima facie* foundation, all three statements were then bootstrapped on one another so they could be deemed reliable and admitted at a trial for second degree murder. And, all of this bootstrapping was done with hearsay evidence on top of hearsay evidence. At least in *Wright* and *Lilly*, the hearsay evidence was bootstrapped onto trial testimony. Moreover, the hearsay evidence being bootstrapped here was obtained for a completely different charge than the crime being prosecuted and introduced for the purpose of proving a state of mind, namely the intent to kill.

This case presents this Court with the opportunity to consider many issues in the context of co-conspirators' statements. First, it presents this Court with the opportunity to determine whether a *prima facie* case of conspiracy, the necessary foundation for admitting an alleged co-conspirator's statement, can be established solely through hearsay evidence. Next, this case presents the opportunity for this Court to consider whether, through bootstrapping on other evidence, an otherwise inadmissible hearsay statement at a pre-trial hearing becomes a potentially self-admitting co-conspirator's statement at trial, and even if so for evidentiary purposes, whether its admissibility at trial is still subject to a defendant's right to cross-examination under the Confrontation Clause. Finally, because of all of the foregoing issues, this case the presents the opportunity for this Court to consider imposing an absolute bar to the admission of co-

conspirators' statements absent a prior opportunity for cross-examination, which was left open by *Crawford*.

This Court in *Crawford* presumably rejected *per se* the use of "reliability" as the standard for admitting out-of-court statements, even as to non-testimonial evidence, and instead only left open the question as to whether hearsay law determines the admissibility of non-testimonial evidence. This Court further suggested in *Crawford* that hearsay law might govern the admissibility of non-testimonial evidence because it inherently incorporates a reliability standard, at least with respect to "firmly rooted hearsay exceptions."

This case raises the question whether a "co-conspirator's" testimony given to a police informant who is personally beholden to the police and also working for payment falls within a firmly rooted hearsay exception, in other words, is inherently reliable. This case also raises the question whether any presumption of reliability generally afforded by a "firmly rooted hearsay exception" can be or should be overcome by overwhelming indicia of unreliability. And if so, whether that implicates this Court's concerns in *Crawford* over the "amorphous, if not entirely subjective" determination of reliability and the potential for "core confrontation violations" to occur nevertheless because of inconsistent applications among courts.

CONCLUSION

This Petition for Writ of Certiorari should be granted. As an alternative to plenary review, this petition should be granted, the judgment of the Louisiana Court of Appeal for the First Circuit vacated and this case remanded to that court for further consideration in light of *Crawford*. *See, e.g.*, other cases where this Court remanded in light of *Crawford*: *Ko v. New York*, 124 S. Ct. 2839 (2004); *Goff v. Ohio*, 124 S. Ct. 2819 (2004); *Prasertphong v. Arizona*, 124 S. Ct. 2165 (2004); *Corona v. Florida*, 124 S. Ct. 1658 (2004); *Shields v. California*, 124 S. Ct. 1653 (2004).

Respectfully submitted,

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APPENDIX A — OPINION OF THE FIRST CIRCUIT COURT OF APPEAL FOR THE STATE OF LOUISIANA DATED DECEMBER 31, 2003

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NUMBER 2000 KA 1664

STATE OF LOUISIANA

VERSUS

PANOS TSOLAINOS

Judgment Rendered: December 31, 2003

Appealed from the Twenty-Second
Judicial District Court
in and for the Parish of St. Tammany,
State of Louisiana
Case Number 290874

Honorable Donald M. Fendlason, Judge

BEFORE: FOIL, FITZSIMMONS, AND GAIDRY, JJ.

FITZSIMMONS, J.

Defendant, Panos Tsolainos, originally was charged by grand jury indictment with the first degree murder of his ex-wife, Deborah Tsolainos, a violation of La. R.S. 14:30. The state subsequently amended the indictment to charge defendant with second degree murder, a violation of La. R.S.

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14:30.1. Defendant entered a dual plea of not guilty and not guilty by reason of insanity. The trial court appointed a sanity commission. Following a hearing, the trial court found the defendant competent to stand trial. The issue of the defendant's sanity at the time of the commission of the offense was left for the jury to decide. Defendant moved for a change of venue, which the trial court denied. Subsequently, defendant was tried by a jury, and convicted as charged. The trial court denied defendant's motion for a new trial and post-verdict judgment of acquittal. Defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

Defendant now appeals, urging the following assignments of error:

1. The evidence presented to the jury was constitutionally insufficient to sustain a conviction for second degree murder. The errors include, but are not limited to:

   (a) Clarissa Tsolainos admitted she perjured herself at the time of trial, which was confirmed by the conflicts between her testimony and the physical evidence;

   (b) The District Court denied Mr. Tsolainos's Motion in Limine requesting leave to speak with Ms. Tsolainos after she requested such a meeting;

   (c) The record as a whole reveals that there is no legally recognizable basis for sustaining a second degree murder conviction.

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2. The conviction in this case must be overturned because Mr. Tsolainos did not receive the constitutionally mandated fair and impartial trial. The errors include, but are not limited to:

   (a) The District Court erred in denying Mr. Tsolainos's Motion for a Change of Venue which was supported by extensive expert testimony and polling data;

   (b) The voir dire of prospective jurors in this case was rendered defective by the District Court's failure to permit appropriate detailed individual questioning of jurors after the uncontroverted expert polling data reflected an inherent prejudice by the potential jurors;

   (c) The District Court improperly denied challenges for cause against certain jurors who, as supported by the pretrial publicity, the uncontradicted expert testimony, and polling data, were prejudiced by the pretrial publicity such that they were not forthcoming under the circumstances and held a significant bias/taint against Mr. Tsolainos;

   (d) The District Court's denial of challenges for cause, after Mr. Tsolainos exhausted his peremptory challenges, and despite the expert testimony and polling data which revealed extensive adverse pretrial publicity, resulted in legally presumed prejudice against Mr. Tsolainos;

(e) The jury panel was tainted by the failure of a juror, Mark Berryhill, to admit his relationship with a "witness" and to disclose an acrimonious divorce despite direct questioning on the topic and this special significance to the circumstances of this case.

3. The District Court erred in admitting the state's **Prieur** evidence. The errors include, but are not limited to:

(a) The District Court erred in allowing the state to attempt to prove the existence of a conspiracy based solely on hearsay statements;

(b) The District Court erred in finding that the "agreement" stage of a conspiracy was satisfied by a drug dealer's (Gerald Branigan) solicitation of Mr. Tsolainos;

(c) The District Court erred in finding that confidential police informant (Charles "Tinker" Schmolke) was ever a member/participant in any conspiracy;

(d) The District Court erred in finding that there was an affirmative act in furtherance of the alleged conspiracy by any of the alleged participants;

(e) The District Court erred in admitting a recorded hearsay conversation between Messrs. Branigan and Schmolke and in finding that it alone was

sufficient to constitute an affirmative act in furtherance of an alleged conspiracy;

(f) The District Court erred in allowing, for the first time in Louisiana, the existence of a conspiracy to be proven solely on the basis of hearsay and where the party against whom the evidence was sought to be used was denied the right of confrontation against the alleged co-conspirators;

(g) The District Court erred in allowing any of the three "Kell" tapes to be played, or referred to, at trial, especially where Mr. Schmolke admittedly was not a member of any alleged conspiracy at the time the recordings were made;

(h) The District Court erred in refusing to grant a mistrial after admitting the first "Kell" recording and then reversing its position and striking the two subsequent conversations. This is particularly true since the District Court, over Mr. Tsolainos's objection, allowed the jury to hear the first "Kell" tape prior to its ruling on the second two. Further, repeated references were made to the excluded tape recordings by the state and state's witnesses.

4. The District Court erred in allowing taped prejudicial hearsay statements from Messrs. Branigan and Schmolke to be played for the jury when

Mr. Tsolainos was unable to confront them because Mr. Schmolke committed suicide shortly prior to trial and Mr. Branigan asserted his Fifth Amendment privilege against self-incrimination. The errors include, but are not limited to:

(a) The District Court denied Mr. Tsolainos his constitutional right to confront the witnesses against him;

(b) The District Court improperly denied Mr. Tsolainos his right of confrontation by denying a continuance of the second degree murder trial until after the conspiracy trial, which would have allowed Mr. Tsolainos to confront Mr. Branigan and also resolve the legal issues of the conspiracy as admitted into the instant trial as evidence;

(c) In addition to prejudicing Mr. Tsolainos on these issues, the District Court's refusal to exclude all of the "Kell" transmissions and grant Mr. Tsolainos's motion for a mistrial, not only prejudiced him with respect to consideration of the *Prieur* issue, but also denied him his right to confrontation of witnesses against him.

5. The District Court erred in allowing evidence of Mr. Tsolainos's past drug use to be introduced at the time of trial. The errors include, but are not limited to:

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(a) The District Court erred in allowing members of a court-appointed sanity commission to exceed their mandate and essentially testify as state consultants. Those doctors then utilized statements made during the course of the confidential sanity proceedings as substantive evidence against him on the issue of guilt or innocence;

(b) The District Court erred in admitting photographs of drug paraphernalia in the Tsolainos's home to be introduced for the express purpose of implying that Mr. Tsolainos was a drug abuser when he in fact had not lived in the house for weeks prior to the incident at issue;

(c) The District Court erred in admitting evidence of Mr. Tsolainos's prior drug use in the absence of **Prieur** notice;

(d) The District Court erred in allowing evidence of Mr. Tsolainos's past drug use when every mental health professional who testified at the time of trial indicated that any drug use would have had no effect on his mental state at the time of the incident in question.

6. The District Court erred in refusing to grant Mr. Tsolainos's Motion for New Trial based upon newly discovered evidence pursuant to La. Code Crim. P. art. 851(3). This issue is reviewable because

the District Court abused its discretion in denying the motion and, as such, error of law is presented. The errors include, but are not limited to:

(a) The District Court applied the wrong legal standard to the Motion for New Trial. The District Court acted as a "thirteenth juror" instead of considering whether a second jury, based on the newly discovered evidence, would have reached a different result and if the new evidence would change the dynamics of the trial;

(b) The District Court erred by holding that Clarissa Tsolainos's perjury concerning her mother's alcohol consumption on the date of her death was immaterial;

(c) The District Court erred in finding that Clarissa Tsolainos's perjury presented only issues of credibility rather than directly affecting the substantive evidence which the jury had to consider;

(d) The District Court erred in failing to grant the Motion pursuant to **State v. Cherry** and **State v. Watts**, where the two principal witnesses were Clarissa Tsolainos, who was an admitted perjurer, and George Deforrest, who was offered $20,000 or a new truck for his testimony; and especially where multiple disinterested witnesses testified at the Motion for New Trial hearing that Clarissa Tsolainos (1) told them

that George Deforrest had lied for her at the trial, including his statement that he heard the one incriminating statement by Mr. Tsolainos, and (2) told them that she had to buy George Deforrest a new truck or give him $20,000 because he lied for her.

7. The jury verdict should be overturned because of multiple **Brady** violations by the state. The specific violations are fully set forth in Mr. Tsolainos's briefing of this error.

8. The District Court erred in admitting Mr. Tsolainos's statements.

9. The District Court erred in failing to quash Mr. Tsolainos's indictment.

10. Mr. Tsolainos specifically requests that this court review the entire record of this proceeding for errors patent, which would warrant overturning the verdict in this case.

Finding no merit in any of the assigned errors, we affirm the defendant's conviction and sentence.

FACTS

On the evening of July 19, 1998, at approximately 8:00 p.m., Clarissa Tsolainos called 911 from her home on Morgan Bluff Road in Pearl River, Louisiana. She requested emergency medical assistance for her mother, Deborah Tsolainos (the victim). Clarissa informed the operator that

her father, the defendant, had run over the victim with a vehicle. Clarissa explained that the victim was stuck beneath the vehicle and needed immediate assistance. Clarissa further indicated that the defendant also hit her and her younger sister, Stephanie, with the vehicle.

St. Tammany Parish Sheriff's officers and Fire District personnel responded to the call. Upon arriving at the residence, sheriff's officials found the victim's lifeless body partially wedged beneath an overturned 1993 Buick Skylark. The vehicle was positioned at an angle, with the passenger side on top of the victim's neck and shoulder area. Despite all rescue efforts, Mrs. Tsolainos was pronounced dead shortly thereafter. The defendant, who was still present on the scene, was arrested and subsequently indicted for murder.

ASSIGNMENT OF ERROR NUMBER ONE
SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, the defendant asserts that the evidence presented at trial was insufficient to support the second degree murder conviction. More particularly, defendant argues that the state failed to prove he specifically intended to kill or to inflict great bodily harm upon the victim. Defendant claims he accidentally struck the victim when he misapplied the vehicle's controls while attempting to leave the area.[1]

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1. In connection with this assignment of error, the defendant also argues that new evidence, discovered after trial, indicates that several prosecutorial witnesses presented perjured testimony before the jury. This testimony, the defendant contends, renders the state's

(Cont'd)

Appendix A

Standard of Review

The standard of review for the sufficiency of evidence is whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. La. Code Crim. P. art. 821. This standard of review, in particular the requirement that the evidence be viewed in the light most favorable to the prosecution, obliges the reviewing court to defer to the actual trier of fact's rational credibility calls, evidence weighing, and inference drawing. **State v. Mussall**, 523 So.2d 1305, 1308-11 (La. 1988). Thus, the reviewing court is not permitted to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. **State v. Burge**, 515 So.2d 494, 505 (La. App. 1st Cir. 1987), *writ denied*, 532 So.2d 112 (La. 1988); *see* **State v. Houston**, 98-2658, p. 5 (La. App. 1st Cir. 9/24/99), 754 So.2d 256, 259.

(Cont'd)

overall evidence insufficient. Because this portion of the defendant's argument deals with evidence that was not presented to the jury at trial, this argument will be addressed with assignment of error number six, wherein the defendant challenges the trial court's ruling on his motion for a new trial. For the purposes of this assignment, we will consider only the evidence actually introduced before the jury at trial.

The defendant also assigns as error the trial court's denial of his motion in limine requesting leave to speak with Clarissa Tsolainos. However, he failed to articulate the basis for the alleged error, or cite supporting record references or law in his appellate brief. Thus, we did not consider the correctness of the denial. *See* Uniform Rules Courts of Appeal, Rule 2-12.4.

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Louisiana Revised Statutes 14:30.1 A(1) provides, in pertinent part, that second degree murder is a killing that occurs "[w]hen the offender has a specific intent to kill or to inflict great bodily harm. . . ." Thus, the state was required to prove, beyond a reasonable doubt, that the killing was done with specific intent to kill or to inflict great bodily harm.

Specific criminal intent is defined as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1). Specific intent need not be proven as a fact, and may be inferred from the circumstances present and the actions of the defendant. Specific intent is a legal conclusion to be resolved ultimately by the trier of fact. **State v. Carter**, 96-0337, p. 3 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 434-35.

Trial Testimony of Clarissa Tsolainos

At trial, Clarissa Tsolainos, the defendant's adopted daughter (the biological daughter of the victim), testified for the state. In her testimony, Clarissa indicated that she personally observed the incident. Clarissa provided a detailed account of the events leading to the tragic incident. She also provided pertinent background information on the Tsolainos's familial situation.

Clarissa testified that she and her older sister, Melissa Tsolainos, were the biological children of the victim and had been adopted by the defendant when they were very young.

The victim and the defendant later had two children together, Stephen and Stephanie Tsolainos.[2]

Clarissa testified that she loved the defendant and considered him to be her father. According to Clarissa, the defendant and the victim enjoyed what Clarissa considered to be a "great" marriage, that is, until the victim became addicted to prescription drugs after a back injury. After years of struggling with the victim's drug addiction, which ultimately escalated from prescription pain medications to heroin, the defendant separated from the victim in 1996 and eventually filed for a divorce. The defendant maintained sole custody of the children and use of the Morgan Bluff Road residence.

After the divorce, the victim moved to St. Louis, Missouri, to be closer to her family. Clarissa originally remained in Pearl River with the defendant, but she eventually moved to St. Louis with the victim. Clarissa lived with the victim for approximately one year immediately preceding the incident in question. Clarissa stated that the victim had turned her life around and was clean and sober during the time that she lived with her. Clarissa claims the victim was gainfully employed and drug-free.

According to Clarissa, the victim and the defendant were involved in ongoing disputes regarding the custody of Stephen and Stephanie, and settlement of the community property. On several occasions, Clarissa returned to Louisiana with the victim to attend family court proceedings on

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2. The record establishes that Stephen and Stephanie Tsolainos were minors at the time of the incident in question.

these issues in St. Tammany Parish. At a hearing on Friday, July 17, 1998, while the defendant was in jail on charges alleging that he had conspired to kill the victim, the victim was awarded custody of the minor children and temporary use of the Morgan Bluff Road residence.

The following day, Saturday, July 18, 1998, Clarissa and the victim worked all day cleaning the residence, which appeared to have been trashed. Clarissa testified that the victim had been in a good mood all day because she had finally gained custody of her young children. Later that evening, the victim went out with her sister, Carlotta. Clarissa testified that the victim returned in approximately one to two hours.

On Sunday, July 19, 1998, Clarissa, the victim, and Clarissa's friend, George Deforrest, continued cleaning the Morgan Bluff Road residence. At approximately noon, Connie Deville, the defendant's girlfriend, arrived at the residence in her mother's 1993 Buick Skylark. Connie had come to retrieve some personal property she and the defendant had stored at the residence. Clarissa and the victim helped Connie pack some of her things into the Skylark. Shortly thereafter, the victim learned that the defendant had come with Connie and was waiting for her across the street from the residence. The victim was initially startled by the defendant's presence, but later decided to bring Stephen and Stephanie out to the street to meet with their father. The victim and the children visited with the defendant for approximately fifteen minutes. The victim then returned to the residence and informed Clarissa that the defendant wanted to see her. Clarissa also went out to the street and visited

with the defendant. Eventually, without any objection by the victim, the defendant came onto the property and assisted Connie in loading the vehicle. Once the vehicle was full, the defendant and Connie left the area.

Clarissa testified that later that evening, at approximately 6 p.m., as she and the victim prepared to eat dinner, the defendant and Connie returned to the residence. Because the victim was already aware that the defendant and Connie would be returning to the residence, she did not object to the defendant's presence on the property. Instead, the victim went outside and assisted the defendant and Connie with their things. According to Clarissa, the scene was amicable. In fact, at some time during the visit, the victim told Clarissa that the defendant and Connie "looked cute together."

Later, as Clarissa and George Deforrest continued cleaning the residence, they heard a loud noise outside. As Clarissa ran outside to determine the source of the noise, she heard the engine of the Skylark being revved, as if the defendant, whom Clarissa observed seated in the driver's seat, was depressing the accelerator. Connie was also inside the vehicle, seated on the passenger side. Outside the vehicle, the victim was yelling and banging on the vehicle's hood. The victim was verbally demanding that the defendant vacate the property. According to Clarissa, the victim was very angry and was yelling so much her face was turning red. The victim eventually approached the passenger side of the vehicle and began to hit on the window. Clarissa stated that the victim told Connie that she could come back, but the defendant was no longer welcome on the property.

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Clarissa testified that when she approached the victim and questioned her about her actions, the victim "jerked" Clarissa, practically lifted her off of her feet, and told her to "Get the 'f' back inside." Clarissa and the victim began to struggle. As she struggled with the victim, Clarissa observed the vehicle begin to move backwards. While the vehicle was backing up, Connie Deville attempted to exit, and fell to the ground. Then, with Connie outside the vehicle, the defendant pressed the accelerator, aimed the vehicle at the victim, and rapidly proceeded forward, striking the victim in the middle. Because the victim had pushed Clarissa away, the vehicle only grazed Clarissa. Clarissa claims the vehicle also hit Stephanie.

Clarissa testified that after the initial impact, the victim landed on the hood of the Skylark. The vehicle continued to accelerate and eventually hit a tree. The force of the impact threw the victim off the hood and onto the ground. The vehicle flipped over and landed on the victim's head.

Clarissa immediately ran inside and called for assistance. Moments later, when she returned to the yard, Clarissa noticed that the defendant was no longer inside the vehicle. According to Clarissa, when she asked the defendant to help her move the vehicle off the victim, the defendant calmly responded, "she's dead, she's dead, she's dead, she's dead."

Clarissa returned inside and called for help again. When the defendant overheard Clarissa stating that her dad had just "killed" her mom, he approached Clarissa and told her to tell the operator the incident was an accident. He claimed, "it's the emergency brake, it's the emergency brake. It was

the emergency brake, Clarissa, the damn car's emergency brake..." Clarissa further testified that Connie Deville told her, "Clarissa, you have got to tell them it was the emergency brake, the emergency brake."

Trial Testimony of George Deforrest

George Deforrest, who was at the Morgan Bluff Road residence with Clarissa on the day in question, also testified for the state. Deforrest stated that the defendant and Connie Deville visited the residence twice that day. The first visit took place around noon and was uneventful. The defendant eventually came onto the property, but only after the victim and Clarissa came out to visit him across the street. The victim did not object to the defendant's presence on the property. Connie and the defendant gathered what they could fit in the vehicle, indicated that a return trip would be necessary, and left the area.

Later that same evening, Connie and the defendant returned to the residence. They parked the Skylark in front of the opened garage door. While the victim and Connie stood talking nearby, the defendant loaded items into the vehicle. Deforrest testified that the atmosphere was friendly and everyone was getting along well.

While Deforrest and Clarissa were inside the house, they heard the victim's voice screaming outside. Deforrest testified he also heard "tires squealing." Clarissa ran out to investigate and Deforrest followed her shortly thereafter. Upon walking through the interior door of the residence that opens into the garage, Deforrest observed the Skylark backing up. The

defendant was seated in the driver's seat, and Connie Deville was on the passenger side. Deforrest observed Connie Deville fall to the ground when she attempted to step out of the moving vehicle. The victim was outside the vehicle yelling and screaming at the defendant. After backing up for approximately twenty feet, the vehicle came to a stop, the engine "revved up," the tires squealed, and the vehicle proceeded forward. According to Deforrest, the vehicle rapidly moved forward and struck the victim. The victim landed on the hood, and the vehicle continued past the garage opening. As the vehicle moved past the garage, the sound of the accelerated engine continued. Deforrest testified there was no sound of the vehicle's brakes ever being applied.

Deforrest then ran from his position inside the garage area out into the yard where he observed the vehicle resting on its passenger side with the victim wedged beneath. Deforrest ran inside to call for help and Clarissa ran in behind him. Clarissa took the telephone and instructed Deforrest to go and help the victim.

Deforrest returned to the vehicle to assist the victim. Shortly thereafter, Deforrest observed the defendant climbing out of the driver's side of the vehicle. Deforrest testified that as he attempted to remove the vehicle using a jack, he heard the defendant say, "that f-ing bitch got what she deserved, she shouldn't have been running her f-ing mouth off."

Deforrest continued his attempts to extricate the victim and eventually asked the defendant for assistance. The defendant did not respond to the request. Deforrest continued his rescue efforts until the police and rescue

personnel arrived. Shortly thereafter, Deforrest gave a taped statement describing the incident to Detective Robert Juge of the St. Tammany Parish Sheriff's Office.

Trial Testimony of Coroner

The state also presented the testimony of Dr. Fraser Mackenzie, a forensic pathologist with the Jefferson Parish Coroner's Office. Dr. Mackenzie performed an autopsy on the victim on July 20, 1998, wherein he noted numerous injuries, which included abrasions on the left shoulder area, left buttocks, scattered on the abdomen, and left lower leg. Dr. Mackenzie also noted fractures of the posterior first through fourth ribs on the right side. There was blood in the right chest cavity, which Dr. Mackenzie attributed to the breakage of the ribs. The victim's right upper arm was fractured. Dr. Mackenzie opined that the bruising of the victim's arm and ribs was consistent with the photographs depicting the victim wedged beneath the vehicle with her right arm and shoulder in a "very awkward position."

As for the cause of the victim's death, Dr. Mackenzie noted that the position of the heavy vehicle over the torso portion of the victim's body would have prevented the chest from expanding, making it impossible for the victim to breathe. The inability to breathe would have prevented the victim from getting any oxygen into her blood. Dr. Mackenzie also noted that the victim's carotid artery was severed, an injury that would have caused the victim to bleed to death. Dr. Mackenzie opined that severed arteries are usually caused by deacceleration, meaning the body stops, but the inside organs do not. Severing of the carotid artery is consistent

with the victim's body being thrown from the car and onto the ground. Dr. Mackenzie stated that the aforementioned injuries, although potentially fatal, would not have resulted in the victim's death instantaneously. The victim could have lived approximately three to five minutes with each of the injuries. Considering the facts and circumstances surrounding the incident, Dr. Mackenzie ruled the victim's death a homicide.

Dr. Mackenzie further testified that in connection with the autopsy, he collected blood and urine samples from the victim to determine toxicology. The results showed no evidence of marijuana, cocaine, or opiates (heroin). The results did, however, reveal the existence of alcohol in the victim's blood. Dr. Mackenzie testified that the victim's blood alcohol level at the time the sample was collected was .07. This finding, according to Dr. Mackenzie, is inconsistent with someone who had nothing to drink in the twenty-four hours immediately preceding death. Instead, Dr. Mackenzie testified, the finding suggests that the victim consumed approximately four to five beers within an hour of her death.

Evidence on Previous Conspiracy to Kill Victim

To assist in proving intent to kill, the state introduced testimony concerning a prior incident in which the defendant participated in a conspiracy to kill the victim. Detective John Scallan of the St. Tammany Parish Sheriff's Office testified that on June 30, 1998, Charles "Tinker" Schmolke, a confidential informant, contacted him. Schmolke disclosed that an individual, named Gerald Branigan, had approached Schmolke and requested his assistance in killing someone.

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Branigan told Schmolke that the defendant was willing to pay to have the victim, his ex-wife, killed. To test the accuracy of this information, Scallan asked Schmolke to meet with the co-conspirators while wearing an electronic transmitting and recording device. Schmolke agreed to cooperate with the investigation.

According to Scallan, there were three meetings during which Tinker feigned the role of a co-conspirator. Scallan monitored the conversations of each meeting by listening to the audio transmissions over the electronic device worn by Tinker. Scallan also attempted to record the conversations at each of the meetings. However, due to a malfunction in the recording device, Scallan successfully recorded the conversations of only the first meeting.

The first meeting took place on the afternoon of June 30, 1998, at the residence Branigan shared with his girlfriend, Melanie Johnson. During this meeting, Schmolke, equipped with the Kell monitoring device, conversed with Branigan regarding the details of the conspiracy. Scallan testified that Schmolke's conversation with Branigan corroborated the conspiracy information initially relayed by Schmolke. The conversation was successfully recorded with an audio recording device stored inside Scallan's vehicle.

During Scallan's testimony, the audio recording of the conversation between Branigan and Schmolke was played for the jury. At the beginning of the conversation, Schmolke stated that he wanted to receive an advance payment for his participation in the planned homicide. Branigan informed Schmolke that when Branigan asked the defendant for $2,500

in advance, and another $2,500 after the homicide, the ex-husband (defendant) said "go." When Schmolke asked how the homicide would be accomplished, Branigan replied that they were going to "O.D." the intended victim, who was a heroin addict living in St. Louis, Missouri. Branigan further stated that the ex-husband was to give him some pictures and additional information on the intended victim's location and where she "hung" out. Schmolke indicated he did not want to participate in the job blindfolded and wanted to do the job right. Branigan reiterated that the intended victim was the ex-wife of the individual who sought their services. The intended victim was alone, as her daughter, who was about twenty years old, had moved back to New Orleans and could not be in their way. Schmolke told Branigan they could do business if Branigan would split the $2,500 advance payment with him. Branigan agreed, and said he would talk to the ex-husband and get the pictures later that night. Schmolke responded that he wanted to see some of the pictures if Branigan was able to get them. When Schmolke asked Branigan what the intended victim's name was, he answered that he did not know her first name, but that the last name was Tsolainos. Additionally, Branigan indicated that he and Schmolke would ride to St. Louis on a bus, kill the ex-wife by giving her a drug overdose, and then return to Louisiana. At the conclusion of the conversation, Schmolke affirmed his agreement to participate in the killing.[3]

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3. The jury was provided copies of a revised transcript of the conversation. The original transcript erroneously listed Detective Bobby Juge as the officer who monitored the conversation. In connection with the defense theory that the police botched the criminal investigation in this case, the original transcript was also introduced into evidence and presented to the jury at trial.

Det. Scallan further testified that on July 1, 1998, Schmolke had two additional meetings with Branigan. Despite the officer's attempts, these conversations were not successfully recorded due to a malfunction in the recording device. Although Det. Scallan had monitored both meetings as they took place, the trial court sustained the defendant's objection and refused to allow Det. Scallan to recount the contents of the conversations at trial.

The state also presented testimony from Detective Bobby Juge of the St. Tammany Parish Sheriff's Office. Det. Juge testified that he was assigned to the investigation of the alleged conspiracy on July 6, 1998. After speaking with Branigan and his girlfriend, Melanie Johnson, Det. Juge arrested Branigan and charged him with conspiracy to commit murder. Thereafter, on July 7, 1998, Det. Juge obtained warrants for the arrest of the defendant and his adopted daughter, Melissa Tsolainos.[4] Subsequently, the defendant and Melissa were arrested and transported to the St. Tammany Parish jail in Covington, where they both gave statements to Det. Juge. During Det. Juge's testimony, the state introduced a copy of the defendant's statement into evidence. The taped statement was played for the jurors, who were also provided with copies of a transcript of the statement

In the taped statement, made approximately two weeks before the victim's death, the defendant admitted that two months earlier he had been introduced to Branigan, who was

4. Melissa Tsolainos was present during one of Schmolke's meetings with Branigan and was alleged to have had knowledge of the conspiracy plans. Melissa also was charged with conspiracy, but after a trial, she was acquitted.

referred to as "G" (Gerald Branigan), through his daughter, Melissa. Defendant stated that he knew Branigan was a hit man. The defendant asked Branigan if he knew what was involved in having someone killed. When Branigan asked why the defendant was seeking this information, the defendant told Branigan that he was having problems with his ex-wife because she was trying to gain custody of their children and half of their assets. Approximately six weeks later, Schmolke contacted Melissa Tsolainos and asked her to have the defendant contact him. Schmolke ostensibly was attempting to put the defendant in contact with Branigan, but the defendant claimed he had been avoiding Branigan to keep from giving him a definite answer about the murder. The defendant did not speak to Schmolke because he talked to Branigan first. Branigan told him that the hit would be done.

The defendant told Branigan that the intended victim was in St. Louis, but did not provide Branigan with her address or telephone number. The defendant and Branigan then negotiated a price. The defendant thought he agreed on $500.00, but later found out that he had misunderstood and the actual asking price was $5,000.00. They also discussed payment arrangements. Half of the arranged fee was to be paid before Branigan left for St. Louis, with the balance to be paid upon his return. The defendant and Branigan also arranged a method by which the defendant could inform Branigan if it was safe to return to St. Tammany Parish after the murder. The defendant claimed he was supposed to provide Branigan with the intended victim's address and a photograph of her, but he never actually did. The defendant stated that during his final conversation with Branigan,

Branigan asked the defendant if he still wanted to go forward with the planned murder. The defendant responded affirmatively, but instructed Branigan to wait until further notice.

Defendant also provided information on the extent of Melissa's involvement in the conspiracy plans. He indicated that Melissa knew what he was trying to arrange with Branigan:

Q. She knew that you planned on or you were in the process of getting a hit done?

A. Yes, and that's when I explained to her that Melissa, this is not a good idea, these boys want to do it either this way or that way, and one of the ways they want to do it is the overdose, and I don't know if Mom's actually doing that anymore. It would look funny, and I don't want to have anything to do with it anymore, and uh, I did . . . I think the whole idea was a bad idea, you know, and I didn't want them bothering her about it either.

Q. Did she know right at that point, when you told her it was going to be done by an overdose?

A. Well, that's when I discussed about, I tried to inform, I was informing her of what the plan was.

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Detective Juge's Trial Testimony

Det. Juge further testified that on July 19, 1998, he became involved in the investigation of the murder of the victim. At approximately 8:15 p.m., Det. Juge was dispatched to the Morgan Bluff Road residence. Upon determining that there were eyewitnesses to the incident, Det. Juge spoke with Clarissa, Stephen Tsolainos, and George Deforrest. Det. Juge took taped statements from each of them at the residence. Later, at the St. Tammany Parish Sheriff's Office, Det. Juge advised the defendant of his **Miranda** rights, obtained a waiver of those rights, and asked the defendant what happened. The defendant replied, "I just killed my old lady. What else you want me to say?" Thereafter, the defendant made a taped statement to Det. Juge.

In his taped statement, the defendant told the detective that, on July 19, 1998, he and Connie Deville left Marrero and traveled to Waveland, Mississippi, to look at real estate. According to the defendant, the couple planned to get married and settle there. While in Waveland, Connie called her home and learned that Bobby Brown, the maternal uncle of the defendant's children, had called her home looking for the defendant. In response, the defendant contacted Brown and learned that the victim, who had been granted use of the Morgan Bluff Road residence, had requested that Connie Deville come and retrieve the things she had stored in the garage of the residence. The defendant and Connie immediately proceeded to the Morgan Bluff Road residence to retrieve their belongings.

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Upon arriving near the residence, the defendant exited the vehicle at a stop sign approximately 100 yards from the residence and Connie went onto the property. The defendant stayed behind due to the conditions of his bond on the conspiracy charge, which prohibited any contact with the victim or their minor children. From his position across the street, the defendant watched as the victim helped Connie load her belongings into the vehicle.

Sometime later, as Connie continued to load the vehicle, the victim brought Stephen and Stephanie Tsolainos, the victim and the defendant's minor children, out to the street and allowed them to visit with the defendant. The interaction between the defendant and the victim was civil, very amicable. Once Connie finished loading the vehicle, Connie picked up the defen !ant from the street and left the area.

Later that evening, after unloading the vehicle, the defendant and Connie returned to the residence. The defendant was driving the vehicle. The defendant entered the property and he began loading the vehicle while the victim and Connie stood aside talking. Finally, when the vehicle was filled, the defendant and Connie prepared to leave. As they said their goodbyes, Stephanie started to cry. She wanted to go with her father. As the defendant tried to console Stephanie, the victim said, "Yeah, you used to be a good father, that's why I did this, so you need to get your act together again." Annoyed by this comment, the defendant replied, "you're a fine one to talk, and uh, at least I didn't do heroin and I didn't take the kids to the projects and put them in harm[']s way everyday." According to the defendant, the victim became very angry. She started crying, yelling, and banging on the vehicle.

The defendant stated that he then entered the vehicle, started the engine, and shifted to reverse. He claimed that he started moving backwards, but stopped to let Connie get in. Meanwhile, the victim was still yelling and pounding on the vehicle's windshield. Connie kept indicating that the victim was going to break her mom's windshield and requesting that the defendant stop her. The vehicle's windshield wipers were engaged and were "going back and forth." The defendant depressed the accelerator, but the vehicle did not move. Somehow, the vehicle was now in neutral. The defendant then shifted the vehicle into what he thought was reverse and depressed the accelerator again. The vehicle went forward and hit the victim.

The defendant denied having any intent to hit the victim. He claimed he thought the vehicle was in reverse when he "gunned" the accelerator. Defendant stated his intentions were to rapidly reverse down the driveway and leave the premises. He knew that he should not have been at the residence and was attempting to flee. Defendant claimed he must have mistakenly shifted the vehicle into drive while attempting to disengage the windshield wipers. The defendant was unable to recall whether he ever applied the brakes during the incident.

The state introduced a copy of the defendant's taped statement and a transcript of its contents into evidence. Detective Juge testified that the defendant showed no remorse during the taped statement.

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Defendant's Evidence

The defendant took the stand in his own defense. Defendant admitted striking the victim with the vehicle. However, he alleged that it was an accident. He claimed he inadvertently shifted the vehicle into drive while attempting to disengage the windshield wipers.

In support of the accident theory, the defendant presented evidence of the design of the Buick Skylark. Dr. Edward Carnes, an expert human factors ergonomist and human factors engineer, testified that the Buick Skylark involved in this case contained several design defects giving rise to increased potential for "control misapplication" or "operator error." The design defects noted by Carnes included the gearshift lever and windshield wiper lever of similar size and shape located in close proximity to one another on the same side of the steering column.

As further support of his control misapplication theory, the defendant also elicited the testimony of Betty Rodriguez, the owner of the Buick Skylark.[5] Mrs. Rodriguez testified that although the defendant periodically used her vehicle to make short trips to the video store, the day of the instant incident was the first time he ever used the vehicle for any extended period of time. She further testified that she often experienced problems differentiating between the gearshift and the windshield wiper lever.

The defendant also presented the testimony of Connie Deville. Deville testified that on the date in question, each

5. The record established that Betty Rodriguez is the mother of the defendant's girlfriend, Connie Deville.

time the defendant attempted to shift the vehicle, the windshield wipers would engage.

Regarding the encounter at the Morgan Bluff Road residence, Deville testified that when she and the defendant prepared to leave, Stephanie began to cry because she wanted to go with the defendant. According to Deville, the defendant then turned to the victim and stated that perhaps the reason the child did not want to be with the victim was because of "what [the victim] did to her while she was pregnant." This remark, Deville stated, upset the victim, and a verbal confrontation between the victim and the defendant ensued.

During the argument, the victim called for Clarissa to come and get Stephanie. Deville testified that Clarissa came outside, got Stephanie, and returned to the house. Thus, Clarissa was not outside when the defendant struck the victim with the vehicle.

Deville stated that she was standing near the vehicle, inside the opened passenger door, when the defendant started the ignition. The defendant revved the engine and the vehicle jerked backwards, knocking Deville to the ground. Meanwhile, the victim and the defendant were still "hollering back and forth." As Deville attempted to get up from the ground, she witnessed the vehicle strike the victim. Deville testified that neither Clarissa nor Stephanie was hit by the vehicle, as they were not outside.

Deville claimed the defendant appeared to be "in shock" immediately after the incident. On cross-examination, Deville testified that the defendant told her, "[t]hey are going to blame me for it and it was an accident."

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In support of his insanity defense, the defendant elicited expert testimony from Dr. John Wilson, a psychologist specializing in "stress and the effects of stress on individuals." Dr. Wilson conducted a one-on-one interview with the defendant, administered psychological tests, and reviewed numerous collateral documents regarding the circumstances surrounding the incident. Dr. Wilson concluded that the psychosocial stresses of the situation: including the victim's rageful state, the victim's history of drug abuse and unpredictably violent behavior, the defendant's knowledge of the existing restraining order, and the unexpected forward movement of the vehicle, all triggered a "hypervigilant" or fear response, which directly impacted the defendant's behavior during the incident in question. Based largely on his clinical evaluation of the defendant, Dr. Wilson opined the psychosocial stresses caused emotional escalation of "fear, panic, confusion, disorientation, [and] increased arousal" in the defendant, which in turn affected the defendant's ability to cope with the situation and to properly operate the vehicle. On cross-examination, however, Dr. Wilson admitted that the defendant's emotional reaction was also due, at least in part, to "anger."

After a careful review of the record, we are convinced that a rational trier of fact, viewing all of the evidence in a light most favorable to the prosecution, could have concluded that the state proved beyond a reasonable doubt that the defendant was guilty of second degree murder. Although the defendant has asserted repeatedly from the time of the victim's death that the incident was accidental, his claim is inconsistent with the testimony presented by eyewitnesses.

The guilty verdict in this case indicates that the jury accepted the testimony of the state's witnesses, and that the evidence was sufficient to show the defendant intended to kill the victim. The jury obviously rejected the defendant's claim that he accidentally ran over the victim when he misapplied the vehicle's controls. As the trier of fact, the jury is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson**, 99-2114, p. 14 (La. App. 15th Cir. 12/18/00), 800 So.2d 886, 894, *writ denied*, 2001-0197 (La. 12/7/01), 802 So.2d 641. We find no error in the jury's decision to accept the testimony of the state's witnesses in this case.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO
FAIR TRIAL

In this assignment of error, the defendant contends that he did not receive a fair and impartial trial. In support of his contention, the defendant alleges the following trial court errors: (1) the trial court's denial of his motion for change of venue based upon pretrial publicity; (2) the trial court's failure to permit appropriate detailed individual questioning of jurors; (3) the trial court's denial of the defendant's cause challenges against certain jurors based upon pretrial publicity; and (4) juror Mark Berryhill's failure to admit his relationship with a witness and to disclose the acrimonious nature of his divorce.

Appendix A

Change of Venue

On September 29, 1998, the defendant moved for a change of venue, arguing that extensive and inflammatory media coverage and pretrial publicity in this case caused preconceived public prejudice against the defendant and made it impossible for him to receive a fair trial in St. Tammany, Tangipahoa, or Washington Parishes. He argued that the extent of the preconceived public prejudice against him necessitated a change of venue. On August 31, 1999, prior to holding a hearing, the court denied the defendant's motion for change of venue as premature, specifically reserving defendant's right to re-urge the motion after the completion of voir dire.[6]

Subsequently, on October 12, 1999, prior to commencement of voir dire, the trial court held a hearing on the defendant's motion for change of venue. In support of his contention that the quantum and inflammatory nature of the pretrial publicity attendant to the case made it impossible for him to receive a fair trial, the defendant introduced results from a public opinion poll, several videotapes of news broadcasts, logs of when the reports were televised, and copies of the numerous newspaper articles reporting on the incident.

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6. Defendant filed a supervisory writ application with this court seeking review of the trial court's ruling on the motion for change of venue. In an unpublished decision, this court denied the writ application. **State v. Tsolainos**, 99-2401 (La. App. 1st Cir. 10/8/99). Defendant then sought supervisory review with the supreme court, which also was denied. **State v. Tsolainos**, 99-2885 (La. 10/11/99), 748 So.2d 457.

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In addition, the defendant introduced newspaper articles and news broadcasts reporting on the public bribery case of 22nd Judicial District Court Judge Patricia Hedges. Judge Hedges was the trial judge responsible for reducing the defendant's bond on the conspiracy charges. She was later indicted for extortion, bribery, and malfeasance in office.[7] Judge Hedges was alleged to have committed malfeasance in office in connection with her reduction of the defendant's bond.

At the hearing, the defendant also presented the testimony of Buster McKenzie, president of Southern Media and Opinion Research, Inc., who was qualified and accepted as an expert in public opinion sampling, with particular expertise in the performance of public opinion polling. Defendant also presented the testimony of Dr. Hunter Downing-Alessi[8], the head of the Department of Counseling, Family Studies in Educational Leadership program at Southeastern Louisiana University. Dr. Downing-Alessi was qualified and accepted as an expert in the field of licensed professional counseling.

McKenzie testified that in connection with the instant case, Southern Media and Opinion Research, Inc. conducted a formal public opinion survey of registered voters in

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7. The defendant was arrested on July 7, 1998 for conspiring to have the victim killed. Bond was set at $800,000. On July 17, 1998, Judge Hedges reduced the defendant's bond to $450,000, and he was released. Two days later, the instant offense occurred.

8. Throughout the record, Dr. Downing-Alessi's name is erroneously cited as "Downey-Alessi."

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St. Tammany, Tangipahoa, and Washington Parishes to determine (1) the extent of media readership and viewership in the tri-parish area, (2) the awareness of media concerning the defendant, and (3) what opinions people might hold with respect to the defendant. In connection with the polling, investigators interviewed approximately 1200 registered voters (400 from each parish) from the study area. The defense introduced the collective survey results from the tri-parish study area, as well as the results from each individual parish.

Results of the St. Tammany Parish poll indicated that of the 400 individuals interviewed, more than 80% were familiar with the facts of the case. However, of the individuals who were familiar with the case, over 60% indicated that they had not formed an opinion about the case.

Dr. Downing-Alessi testified regarding the subtle or subconscious effect that any publicity might have on a prospective juror. In connection with her testimony, Dr. Downing-Alessi reviewed literature and research that indicated that the usual pretrial publicity can prejudice potential jurors. She opined that the usual remedies; such as extended voir dire, judicial admonitions, and deliberations by the jury, are not effective at reducing the publicity-induced prejudice. She believed that potential jurors tend to overestimate their ability to be fair and impartial when faced with emotionally-laden material. After evaluating the results of the public opinion survey and reviewing the evidence of pretrial publicity introduced by the defendant, Dr. Downing-Alessi concluded that a change of venue would be the most effective remedy to combat the effects of pretrial publicity in this case.

At the conclusion of the hearing, the trial court deferred ruling on the motion until after voir dire. The court held that voir dire was necessary to determine if actual prejudice against the defendant existed on the part of the prospective jurors.

According to the information gathered during voir dire, approximately forty-eight prospective jurors were questioned. Of those questioned, the majority, about 85%, had been exposed to some publicity surrounding this case. Of the jurors who were familiar with the case, 10 were dismissed for cause for having formed an opinion about the case based on pretrial publicity.[9] The remaining jurors with any knowledge of the case, all denied that any published accounts of the case would affect their ability to apply the law in a fair and impartial manner. In denying the other challenges for cause based on pre-trial publicity, the trial court reviewed each case and articulated its reasons for finding that the particular juror could be impartial. None of the jurors had taken part in the poll.

Although a defendant is not entitled to a jury that is totally ignorant of the case to be heard, the Louisiana Constitution grants the accused the right to trial by an impartial jury. **State v. Bennett**, 527 So.2d 1126, 1127 (La. App. 1st Cir. 1988). *See* La. Const. art. I, § 16. "A change of venue shall be granted when [a defendant] proves that by reason of prejudice existing in the public mind . . . , or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending."

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9. Two additional prospective jurors were dismissed for cause for other reasons.

Appendix A

La. Code Crim. P. art. 622. In deciding whether to grant a defendant's motion for change of venue, the trial court must decide if prejudice or influence will affect either the answers of the jurors on the voir dire examination or the testimony of the witnesses at trial. **State v. Clark**, 442 So.2d 1129, 1132 (La. 1983).

Factors to consider in determining whether a change of venue is appropriate include:

> (1) the nature of pretrial publicity and the particular degree to which it has circulated in the community, (2) the connection of governmental officials with the release of the publicity, (3) the length of time between the dissemination of the publicity and the trial, (4) the severity and notoriety of the offense, (5) the area from which the jury is to be drawn, (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant, and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire."

State v. Bell, 315 So.2d 307, 311 (La. 1975).

"In urging a change of venue for his trial, an accused must establish that there exists such prejudice in the collective mind of the community that a fair trial is impossible." **State v. Wilson**, 467 So.2d 503, 512 (La.), *cert. denied.* 474 U.S. 911, 106 S.Ct. 281, 88 L.Ed.2d 246 (1985). "The defendant must show more than mere public knowledge of facts

surrounding the offense to be entitled to have his trial moved to another parish." *Id.* "In unusual circumstances, prejudice against the accused sufficient to mandate a change of venue may be presumed." **State v. Moseley**, 587 So.2d 46, 52 (La. App. 2d Cir.), *writ denied*, 589 So.2d 1066 (La. 1991); *see* **Dobbert v. Florida**, 432 U.S. 282, 302-303, 97 S.Ct. 2290, 2302-03, 53 L.Ed.2d 344 (1977); **State v. Clark**, 442 So.2d at 1134. "This presumption of prejudice will only attach when the trial atmosphere is entirely corrupted by press coverage or when it is entirely lacking in the solemnity and sobriety to which a defendant is entitled in a judicial system of fairness." **State v. Mosley**, 587 So.2d at 52. If prejudice is not presumed, the defendant must establish the existence of actual prejudice on the part of prospective jurors. *See* **State v. Goodson**, 412 So.2d 1077, 1080 (La. 1982).

Whether a defendant has made the required showing of more than mere knowledge is a question addressed to the trial court's sound discretion, which will not be disturbed on appeal absent ant affirmative showing of error and abuse of that discretion. **State v. Wilson**, 467 So.2d at 512. Although the trial court possesses a broad range of discretion in this area, the reviewing court is also required to make an independent evaluation of the facts to determine whether the accused received a fair trial unfettered by outside influences. **State v. Daniels**, 628 So.2d 63, 70 (La. App. 1st Cir. 1993), *writ denied*, 94-3044 (La. 11/15/96), 682 So.2d 752.

We have thoroughly reviewed all of the evidence submitted by the defendant in support of the venue motion. The record reveals that the defendant failed to prove that a change of venue was necessary in this case. While the

defendant successfully showed that there was extensive media coverage and general knowledge within the community about the basic facts of the case, he failed to present sufficient evidence of an overriding prejudice within the community's collective mind that prevented him from receiving a fair trial.[10] Although many of the prospective jurors responded that they were aware of the case, and some even indicated that the publicity they recalled was negative, each individual juror assured the court that he or she would be able to set aside that information and decide the case based upon the law and the evidence presented at trial. Prospective jurors who indicated that they had formed an opinion that could not be set aside were excused for cause. Accordingly, we find no abuse of discretion by the trial court in denying the defendant's motion for change of venue. This argument is without merit.

Individual Questioning of Jurors

Next, the defendant contends that the voir dire of prospective jurors in this case was defective. Defendant cites the trial court's curtailment of his questioning on whether the presence of children during this incident would affect the juror's opinion.

During the voir dire examination of prospective juror Woodward, counsel for the defendant asked if the involvement of children in any aspect of the case would affect Mr. Woodward. In response to an objection by the state, the

10. The news articles and broadcasts concerning the case, although admittedly numerous, were primarily factual in nature and tracked the progress of the case.

trial court instructed defense counsel to rephrase the overly broad question. Counsel for the defendant then specifically asked if Mr. Woodward would be affected if he learned that children were involved in this incident. The state again objected. The trial judge sustained the objection, holding that the question goes into facts that may come out in the case. The defendant did not object to the restriction.

Because the defendant failed to object to the trial court's restrictions on voir dire, the issue was not preserved for review. *See* La. Code Crim. P. art. 841; **State v. Edwards**, 94-1985, p. 3 (La. App. 4th Cir. 8/23/95), 660 So.2d 907, 908, *writ denied*, 96-2383 (La. 2/20/98), 709 So.2d 766, *cert. denied*, 525 U.S. 856, 119 S.Ct. 137, 142 L.Ed.2d 111 (1998). Moreover, our review of the transcript of the entire voir dire examination shows that the trial judge afforded defense counsel wide latitude when he examined prospective jurors as to prejudices, predispositions, or misunderstandings relevant to the central issues of the case.

Cause Challenges

The defendant contends that the trial court erred in denying his challenges for cause as to twelve prospective jurors: Ellen Reagin, Carlos Urbina, David Lynch, Kimberly Normand, Jerry Gill, Jon Woodward, Charles Borden, Walton Organ, Mildred Allen, Pamela Rossi, Irene Pratt and Carl Dugas. He argues that the trial court should have granted these cause challenges for the prospective jurors who had been exposed to inadmissible inflammatory information regardless of their professed state of mind. He asserts that the denial of his challenges for cause forced him to expend

eight of his peremptory challenges during the jury selection process.[11] The defendant eventually exhausted all of his peremptory challenges.

A trial court is vested with broad discretion in ruling on challenges for cause, and its ruling will not be reversed unless a review of the entire voir dire reveals the court abused its discretion. **State v. Jacobs**, 99-1659, p. 5 (La. 6/29/01), 789 So.2d 1280, 1284. "Prejudice to the defendant by a trial [court's] rulings is presumed when a challenge for cause is denied erroneously by a trial court and the defendant ultimately exhausts his peremptory challenges." **State v. Williams**, 01-1650, p. 10 (La. 11/01/02), 831 So.2d 835, 845. If a potential juror has formed an opinion of the defendant's guilt based on pretrial publicity, the trial court should grant the defendant's challenge for cause unless the "juror declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence." **State v. Frank**, 99-0553, pp. 19-20 (La. 1/17/01), 803 So.2d 1, 18, *quoting* **State v. Smith**, 491 So.2d 641, 646 (La. 1986); La. Code Crim. P. art. 797(2).

A trial court's refusal to excuse a prospective juror for cause is not an abuse of discretion where, "after further inquiry or instruction, the potential juror has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence." **State v. Jacobs**,

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11. While prospective juror Mildred Allen was included in this assignment of error, the record reflects that Ms. Allen was not challenged for cause based upon exposure to pretrial publicity. Ms. Allen was dismissed from jury service as a result of a peremptory challenge by the state.

99-1659 at p. 5, 789 So.2d at 1284. "If a juror who has acquired knowledge about the case through the media can sufficiently lay aside his or her impression of the defendant's guilt or innocence and render a verdict based on the evidence presented, he or she is competent to serve as a juror." **State v. Frank**, 99-0553 at p. 19, 803 So.2d at 18.

We have reviewed carefully the voir dire examination responses of each of the named jurors. We note that, while several of the challenged jurors admitted exposure to some type of pretrial media coverage, they demonstrated only a cursory familiarity with the facts surrounding the incident and denied that published accounts of the case would affect their ability to remain fair and impartial and to apply the law as directed by the trial judge. Furthermore, although the defendant claims that each of the following jurors was challenged for cause based upon exposure to pretrial publicity, the record before us reveals that such is not the case.

Prospective juror Reagin was challenged for cause because she had been a victim of domestic violence. During questioning, Reagin stated that she had been a victim of domestic violence and arguably indicated that she may have sympathy towards the victim. Later in questioning, Reagin stated that she understood that the state has the burden of proving the defendant's guilt. She assured the court that she would put aside any personal feelings and decide the case based upon the evidence presented at trial. In denying defendant's challenge for cause, the court stated that Reagin had been successfully rehabilitated. The court noted that Reagin's voir dire responses indicated that she could be fair

and impartial. We find no abuse of discretion in the trial court's ruling as to prospective juror Reagin.

Prospective juror Urbina was challenged for cause on the ground that his wife was employed by the St. Tammany Parish Sheriff's Office. During general voir dire examination, prospective juror Urbina indicated that his wife worked in the St. Tammany Parish Sheriff's Office. Later, during individual questioning, Urbina stated that he learned of this case from his wife. Urbina indicated that his wife did not provide many details. She only told him that "something big happened by Pearl River, about where a husband had killed a wife or something. That's about it." He denied hearing anything from his wife regarding Judge Hedges or anyone being in jail prior to the instant incident. When questioned as to whether he had formed an opinion of the case based upon the information received from his wife, Urbina responded negatively. He further indicated that the information he received from his wife would not affect his ability to remain fair and impartial. The trial court denied the challenge for cause, noting that Urbina's wife was new on the job and worked in the accounting department. We find no abuse of discretion in the trial court's ruling. Urbina's voir dire responses do not indicate an inability to decide the case impartially according to the law and the evidence presented at trial.

As to prospective juror Lynch, the defendant urged a challenge for cause based upon Lynch's extensive knowledge of the facts of the case. In support of the challenge, the defendant pointed to Lynch's voir dire response wherein he indicated that he read approximately ten newspaper articles

on this case and even recalled that one of the co-conspirators was from River Gardens. The defendant argued that the prospective juror's intimate knowledge of the case raised a serious question as to his ability to be impartial.

Despite his knowledge of the case and the bond reduction incident, Mr. Lynch indicated he had not formed an opinion as to the defendant's guilt or innocence. He acknowledged that articles appearing in the newspaper are not always an accurate depiction of the facts. Lynch unequivocally indicated that he could ignore anything he had read in the paper, and would decide the case based upon the facts presented at trial. He assured the court that none of the information previously gleaned from the printed media would affect his ability to decide the case in a fair and impartial manner based upon the evidence presented at trial. In denying the defendant's challenge for cause, the trial court noted that based upon Mr. Lynch's voir dire responses, the court was satisfied that the prospective juror could be fair and impartial. We find no abuse of discretion as to the court's ruling as to Mr. Lynch.

The defendant challenged prospective juror Normand for cause based upon voir dire responses, which he contends suggested that she would have a problem affording the defendant the presumption of innocence. He argued that there were lengthy pauses in Ms. Normand's responses when she was questioned concerning whether she would require the defendant to present a defense. In response to the cause challenge, the trial judge, who was present during the voir dire examination, commented on Ms. Normand's responses stating, "[t]he Court did review her demeanor. The Court did observe that her answers were deliberate, but the Court

listened very carefully and she said that she could be fair and that the Court feels and so noted that she would be an appropriate potential juror in this case."

Upon reviewing the entirety of Ms. Normand's voir dire responses, we find no abuse of discretion in the trial court's ruling. Ms. Normand recalled the case from the newspaper and television. She remembered that the ex-wife was killed and the defendant was driving the car. Ms. Normand remembered that there were children involved in the incident and that Judge Hedges had some connection with the case. However, Ms. Normand stated that she could decide the case on the facts presented at trial. She was confident in her ability to serve as a fair and impartial juror.

Prospective juror Gill was challenged for cause based on his exposure to television news coverage during the jury selection process. In response to voir dire examination, Mr. Gill admitted that he had been watching a television program the previous night, when he observed a brief news account indicating that the defendant's trial may be moved to a different venue. He indicated that lie was not specifically watching the news and denied hearing any other information on the case. In denying the challenge for cause, the trial court noted, "[t]he court listened very carefully to Mr. Gill's testimony and finds that he testified, unequivocally, that he could be fair and impartial, that he would listen to the law and evidence, and the Court does not find that his noting that there may be a change of venue has any significant bearing upon the ultimate issue to be cited (sic) if he is made

a juror in this case."[12] Again, we find no abuse of discretion in the trial court's ruling.

Prospective juror Woodward, also challenged for cause by the defendant, did not recall the case at all. He indicated that he did not watch television and rarely read the newspaper. Mr. Woodward had no knowledge of any of the facts surrounding the incident or any facts relating to Judge Hedges. Mr. Woodward did, however, admit that the fact that someone has been in jail before might raise a question as to his or her character. The defendant challenged Mr. Woodward for cause based upon the aforementioned response, which he believes indicates the juror's inability to be fair and impartial. In denying the challenge, the trial court noted that Mr. Woodward indicated that the fact that a person has been in jail "might" raise a question as to his or her character, but would not be definitive on the issue. The court also observed that the juror's "demeanor was one of straightforwardness." For these reasons, we find no abuse of discretion in the trial court's denial of the challenge for cause.

The defendant's challenge for cause as to prospective juror Borden centered around Borden's indication that he would have difficulty considering testimony by a psychologist as opposed to a psychiatrist. The trial court, in denying the cause challenge, indicated that Mr. Borden successfully rehabilitated himself on the psychologist versus

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12. The trial court stated that it had admonished the entire panel of prospective jurors to refrain from watching any news commentary or news programs and from reading any articles concerning the case. The court further noted for the record that Mr. Gill was late and missed the admonishment of the Court in that regard.

psychiatrist issue. The court further noted that Mr. Borden testified that he could not classify the incident as accidental or criminal based solely upon his recollection of news accounts or media coverage. In response to voir dire examination, Mr. Borden admitted that he vaguely recalled the facts of this case. He did not recall whether the incident was presented as an intentional act or as an accident. Mr. Borden stated he was unaware of any connection the defendant may have had with Judge Hedges. While Mr. Borden originally stated that he did not agree with many of the philosophies of psychologists, he ultimately indicated that if a psychologist testified in this case he would listen and scrutinize the testimony before drawing a conclusion. We find no error in the trial court's denial of defendant's challenge for cause as to prospective juror Borden.

Next, the defendant challenges the trial court's denial of his challenge for cause as to prospective juror Organ. The defendant sought to have Mr. Organ excused for cause based upon his indicating that he would have animosity toward the defendant's trial attorneys. During his voir dire examination, Mr. Organ admitted that he was familiar with the incident involved in this case. He also recalled that there were some charges pending against Judge Hedges for letting someone out of jail. However, he did not recall that the matter with Judge Hedges was in any way connected to the instant case. He stated that he understood that as a juror he would be required to rely solely on the evidence presented at trial when deciding the case and did not have a problem doing so. Mr. Organ further indicated that he would not have a problem affording the defendant the presumption of innocence. In response to a question regarding whether he had any

animosity towards defense counsel, Mr. Organ replied, "I would say, is there animosity in my gut? Yes, it would be a lie to say there's no animosity. To say, can I be fair enough and believe that this gentleman deserves to be treated fairly and not put in jail for his life if he doesn't deserve to be there, then intellectually I would like to think I could make a fair judgment." In denying the challenge for cause, the trial court noted, "[t]he Court also observed the demeanor of this potential juror. Recognized him to be articulate. Recognized him to be – possess a good grasp of the questions that had been put to him. And the Court finds that this juror certainly rehabilitated himself, answered very candidly to defense counsel's questions about the animosity issue. He, I recall very vividly, he said that he would not hold that against Mr. Tsolainos." Considering Mr. Organ's voir dire response as a whole, we find no error in the trial court's denial of the cause challenge.

The defendant challenged prospective juror Rossi for cause based upon her voir dire response indicating that she thought the defendant was in trouble and would expect him to present a defense. During voir dire, Ms. Rossi indicated that she vaguely recalled the facts of this case from the newspaper. She did not recall whether the news media characterized the incident as an accident or an intentional act. Ms. Rossi admitted that while she initially found the incident to be an "unusual coincidence" based upon the information indicating that there was some trouble in the family, she did not automatically conclude it was intentional. Ms. Rossi stated that although she thought the defendant was in a lot of trouble based upon the fact that the incident occurred, she was aware that a criminal defendant is not

required to present a defense. Ms. Rossi did not recall any information indicating that the defendant had been in trouble before the present charge. Ms. Rossi unequivocally indicated that she could set aside any personal feelings and rely solely on the evidence presented at trial. She further indicated that the information she read on this case did not, in any way, affect her ability to remain fair and impartial. On the issue of other crimes evidence, Ms. Rossi indicated that out of fairness to the defendant, she would require that the state prove that the offense alleged was actually committed by the defendant. Ms. Rossi further indicated that she would not have a problem following the law as instructed by the trial judge in deciding this case.

In denying the challenge for cause, the trial court noted that it observed Ms. Rossi's demeanor and her responses to the questions posed and was impressed with her answers. The court found that Ms. Rossi's voir dire responses indicated that she could be fair and impartial and that she was not unduly swayed by any pretrial publicity. After reviewing Ms. Rossi's voir dire responses and the findings of the trial court, we find that the trial court correctly denied the defendant's challenge for cause as to this potential juror.

The defendant challenged prospective juror Pratt for cause based upon her inability to be fair and impartial. Specifically, the defendant pointed to Ms. Pratt's voir dire response wherein she indicated that she believed that Judge Hedges did something wrong. The trial court noted that while Ms. Pratt did mention that she thought Judge Hedges did something wrong, she indicated that she would not hold this against the defendant. The court concluded that Ms. Pratt

indicated that she could put aside anything she may recall about Judge Hedges and follow the law as instructed by the court. After reviewing the record and considering Ms. Pratt's voir dire responses as a whole, we find no error in the trial court's determination that Ms. Pratt could be a fair and impartial juror. The trial court did not abuse its discretion in denying the challenge for cause as to Ms. Pratt.

Finally, the defendant challenged prospective juror Dugas for cause based upon his inability to be impartial. The defendant noted that although Mr. Dugas stated that he would do his best, he expressed some reservations about whether his best would be good enough. Defendant argued Mr. Dugas never unequivocally stated that he would be able to set aside prior feelings in deciding this case.

In denying the challenge for cause, the trial court stated that it "listened very carefully to Mr. Dugas's individual voir dire and was impressed with his thoughtfulness, his articulate answers, and also his understanding of media and how they often have a spin or slant or it's a one-sided presentation." After noting that the voir dire responses provided by Mr. Dugas were similar to the responses of a prospective juror in **State v. "Blaise,"**[13] the trial court denied the challenge for cause.

Our review of the record reveals that during voir dire examination, when asked what he recalled about the case, Mr. Dugas generally recalled that there was an initial incident,

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13. The case referred to by the trial court actually is **State v. Glaze**, 439 So.2d 605 (La. App. 1st Cir. 1983)

then a controversial situation regarding bail with Judge Hedges, and then this incident occurred shortly thereafter. Mr. Dugas recalled that there was substantial controversy surrounding Judge Hedges' actions. In fact, he indicated that he recalled more about Judge Hedges and the investigation than he did about the instant offense. As to whether he believed Judge Hedges did anything wrong, Mr. Dugas stated that he did not have sufficient details from which to draw a conclusion. While Mr. Dugas admitted that he was initially affected by the notably one-sided information provided by the news media, he later stated that in acting as a juror in a trial, he would put all of the outside information aside and listen to all of the facts presented. He further indicated that, "everything would have to be proved." When asked if he would expect the defendant to present a defense, Mr. Dugas stated that the law, as he understood it, provided that a criminal defendant is innocent until proven guilty at trial. When further questioned as to whether the defendant's failure to take the stand would leave questions in his mind, Mr. Dugas replied, "I don't think so."

After carefully examining the record and reviewing the entirety of Mr. Dugas's voir dire responses, we cannot say that the trial judge abused his discretion in concluding that Mr. Dugas could render a fair and impartial decision according to the law and evidence. Thus, the trial court did not abuse its discretion in denying the challenge for cause as to prospective juror Dugas.

Appendix A

Juror Mark Berryhill

The defendant's next argument concerns juror Mark Berryhill. The defendant contends that the jury venire was tainted by Mr. Berryhill's failure to disclose the fact that he was acquainted with Charles "Tinker" Schmolke, and that he had experienced an acrimonious divorce.

A motion for new trial based upon the supposition that injustice has been done the defendant requires a showing that actual injustice or prejudice occurred. La. Code Crim. P. art. 851. Specifically, on the issue of misstatements of jurors, "the defendant must show that he was prejudiced by the misstatement for a new trial to be warranted." **State v. Johnson**, 32,910, p. 5 (La. App. 2nd Cir. 01/26/00), 750 So.2d 398, 403-04, *writ denied*, 2000-0911 (La. 11/3/00), 773 So.2d 140. The trial court has broad discretion in determining the impartiality of jurors. The court's ruling will not be disturbed absent a showing of abuse of discretion. **State v. Winn**, 412 So.2d 1337, 1344 (La. 1982).

On February 25, 2000, the defendant filed a Motion for a New Trial and Post Verdict Judgment of Acquittal based upon newly discovered evidence and tile existence of a prejudicial error or defect in the proceedings. In support of the motion, the defendant alleged, among other things, that evidence discovered after the trial revealed that juror Mark Berryhill was acquainted with Tinker Schmolke, the confidential informant in the conspiracy case. The defendant contends that Mr. Berryhill was impliedly biased, and that the defendant was prejudiced by his presence on the jury and denied a fair trial. The defendant further alleged that

Mr. Berryhill's ability to be fair and impartial was further complicated by his failure to disclose problems in his divorce.

The record in this case reveals that during general voir dire, counsel for the state and for the defense read their prospective witness lists. Neither the state's nor the defense's list included Tinker Schmolke, who had died before the trial.

Thereafter, the trial court asked if any of the veniremen knew any of the named witnesses. Mr. Berryhill did not respond.

Subsequently, counsel for the defense presented the following question to the veniremen: "[h]ave any of you personally been involved in or had a close relative or close friend who has [sic] involved in a divorce that didn't go smoothly? Anybody?" When asked to elaborate on this inquiry, counsel stated, "[w]ell, a term that lawyers use is acrimonious between two parties, fighting with each other over the divorce, community property settlement, things of that nature. Anybody have that experience in their personal life or close friends?" Again, Mr. Berryhill did not respond.

At the hearing on the motion for a new trial, the defendant presented testimony from Ronald Frazier, a private investigator, who indicated that he interviewed the members of the jury after the trial. Frazier testified his interview of Mr. Berryhill revealed that Mr. Berryhill knew Tinker Schmolke and that Mr. Berryhill had been involved in an acrimonious divorce that included criminal charges against him and his ex-wife.[14]

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14. The evidence contained in the record revealed that Berryhill had two prior divorces, only one of which is the subject of this assignment of error.

After a hearing, the trial court denied the motion. The trial court stated:

> First, as to the fact the defendant discovered after trial that one of the jurors, Mr. Berryhill, was acquainted with Tinker Schmolke, the confidential informant in the case. The court notes that although the defendant complains that the State did not list Tinker on its list of witnesses which was read to the prospective jurors, the defendant knew well in advance of trial that the tape of Tinker's conversations with Gerald Branigan, a co-conspirator would be played for the jury.
>
> The State and the defendant knew that Tinker had died several months prior to trial, and because of that the tape would be essential to the State to establish a case of conspiracy. That issue was the subject of a Prieur hearing which was conducted approximately one month prior to trial, after which the court ruled that the tape would be admissible. Given that ruling, the credibility of Tinker would be an issue and the defendant did attack Tinker's credibility at trial based on other grounds. The defendant could have ascertained whether any potential jurors knew Tinker by simply asking the jurors themselves whether any of them knew or had heard of him. This would not have involved a voir dire of the potential jurors on Tinker or his relation to the case as asserted by the defendant, or getting into facts, for that matter, is another way of saying it.

Appendix A

The court always, when it conducts that aspect of the voir dire examination asks the parties to read their witnesses, witness list, may call list, and although that may have something to do with the facts it does not get into a voir dire examination of the essential facts of the case. And that I think would be an objectionable ground if in voir dire you start discussing with the juror, what is your opinion concerning defenses that may be raised with the facts that may be presented. That is clearly improper voir dire. But, to ask the mere question, do any of you know the late Tinker Schmolke, would have been appropriate and would not have been objectionable.

The defendant's failure to exercise reasonable diligence on this issue warrants the denial of defendant's motion on this ground. Notwithstanding that, however, the court does not find that Mr. Berryhill's knowledge of Tinker constitutes an error in the proceeding which was prejudicial to the defendant. Mr. Berryhill testified that he was only casually acquainted with Tinker, a fact which was verified by Tinker's live-in girlfriend, Sheryl Johnson, who testified that in four or five years prior to Tinker's death she never saw Mr. Berryhill with Tinker, and in fact, had never met or even seen Mr. Berryhill until the hearing today.

Regarding Mr. Berryhill's favored response to defense's questions regarding divorces which

> did not go smoothly, his answer or failure to answer during voir dire are not untrustworthy or deceptive based on the record and his testimony today. The question, as phrased by defense counsel asked the potential jurors for an opinion or judgment call on their part. Nothing presented today indicates that Mr. Berryhill did have a divorce which did not go smoothly or was acrimonious in any way.
>
> The court notes that it is not essential that a defendant know every single detail or fact about a potential juror's past in order to intelligently exercise peremptory challenges, and finds that the information provided today by Mr. Berryhill regarding his divorces was not relevant to the question posed by counsel during voir dire. This information does not constitute prejudicial error and would not have changed the verdict in any way.

Considering the reasons provided by the trial court and based on the entire record before us, we find no abuse of discretion in the trial court's denial of defendant's motion. We also find no evidence in this record that would indicate that defendant was denied his constitutional right to a fair and impartial jury. This assignment of error lacks merit.

Appendix A

ASSIGNMENTS OF ERROR NUMBERS THREE AND FOUR PRIEUR ERRORS

In these assignments of error, the defendant contends that the trial court erred in allowing the state to introduce evidence of other alleged crimes or bad acts. Specifically, the defendant complains of the trial court's ruling allowing the state to introduce evidence of his participation in a purported conspiracy to commit the first degree murder of the victim. The defendant's argument is essentially twofold. First, defendant contends that the introduction of the conspiracy evidence violated La. Code Evid. art. 404(B) and **State v. Prieur**, 277 So.2d 126 (La. 1973), which require that the state first show that the alleged other crime was actually committed. Defendant avers that the state failed to sufficiently prove that the crime of conspiracy occurred. Secondly, defendant argues that the state's evidence of a conspiracy, which he contends consisted of a single tape-recorded conversation between Branigan and Schmolke, was inadmissible hearsay.

For the following reasons, we find no error in the trial court's finding that the state proved a prima facie case of conspiracy. Nor do we find error in the court's allowing the recorded conversation between Branigan and Schmolke to be introduced into evidence and played before the jury. Thus, the trial court did not err or abuse its discretion in denying the defendant's motion for mistrial.

Appendix A

Other Crimes Evidence

Because the introduction of evidence of other crimes may unduly prejudice the jury and deny the accused the right to a fair trial, evidence of other crimes or wrongs is generally inadmissible. **State v. Schleve**, 99-3019, p. 13 (La. App. 1st Cir. 12/20/00), 775 So.2d 1187, 1197, *writs denied*, 01-0210, 01-115 (La. 12/14/01), 803 So.2d 983, 804 So.2d 647, *cert. denied*, 537 U.S. 854, 123 S.Ct. 211, 154 L.Ed.2d 88 (2002). This rule of exclusion stems from the "substantial risk of grave prejudice to a defendant" from the introduction of evidence regarding his or her unrelated criminal acts. **Prieur**, 277 So.2d at 128. However, when evidence of other crimes or bad acts tends to prove a material issue and has an independent relevance other than to show that the defendant is a bad person, it may be admitted by certain exceptions. La. Code Evid. Art. 404(B)(1) sets out the purposes for which evidence of other crimes or bad acts may be admitted:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part

of the act or transaction that is the subject of the present proceeding.

"Even when the other crimes evidence is offered for a purpose allowed under Article 404, the evidence is not admissible unless it tends to prove a material fact at issue or to rebut a defense. The probative value of the extraneous crimes evidence must outweigh its prejudicial effect." **State v. Jacobs**, 99-0991, p. 24 (La. 5/15/01), 803 So.2d 933, 951, *cert. denied*, 534 U.S. 1087, 122 S.Ct. 826, 151 L.Ed.2d 707 (2002); La. Code Evid. art. 403.

Prior to trial of this matter, the state filed the appropriate notice of intent to use other crimes evidence. The state sought to introduce the conspiracy evidence to demonstrate not only the defendant's intent to kill and his motive for killing his ex-wife, but also to rebut the defendant's allegations that this was an accidental killing.

Following a hearing, the trial court found that the conspiracy evidence was relevant and admissible. In written reasons, the court concluded that the evidence presented at the hearing was sufficient to prove that the defendant, Melissa Tsolainos, and Gerald Branigan were engaged in a conspiracy to murder the victim. The court further found that there was an overt act in furtherance of the conspiracy: specifically, Branigan's act of contacting Schmolke to solicit his participation in the murder. The court noted that at the time Branigan contacted him, Schmolke was not a state agent or confidential informant. Moreover, Branigan contacted Schmolke again after Schmolke went to the police. Although

Schmolke could not actually act in furtherance of the conspiracy, Branigan's actions were that of a conspirator.[15]

On appeal, the defendant contends that the conspiracy evidence was inadmissible because the state failed to prove any act in furtherance of the conspiracy. He argues that because Schmolke was not a conspirator, his acts cannot be attributed to the conspiracy. Thus, the discussions evince only the agreement phase of a conspiracy. Defendant argues that to conclude that the discussions between Branigan and Schmolke were acts in furtherance of a conspiracy, would eviscerate the requirement of La. R.S. 14:26, which requires the state to prove both an agreement, or combination of two or more persons, and an act in furtherance.

La. R.S. 14:26(A) provides in pertinent part as follows:

> Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime; provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination.

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15. The defendant sought supervisory review of the trial court's ruling on the admissibility of the other crimes evidence with this court. In an unpublished decision, this court denied the writ application. **State v. Tsolainos**, 99-2401 (La. App. 1st Cir. 10/08/99). Defendant then filed a supervisory writ application with the supreme court, which also was denied. **State v. Tsolainos**, 99-2885 (La. 10/11/99), 748 So.2d 457.

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In **State v. Richards**, 426 So.2d 1314 (La. 1982), the Louisiana Supreme Court discussed the overt act requirement of a conspiracy in connection with a first degree "murder for hire" charge. The defendant claimed the evidence was insufficient to establish an overt act and, thus, there was insufficient evidence of guilt.

Defendant Richard[16] was identified as the hit man. The conspirators included Joseph France, the client; Jim McGuire, a friend who gave France the name of the hit man; and Richard. Immediately after giving Richard's name to France, McGuire contacted federal agents and worked out a deal involving some pending charges. McGuire wore a wire transmitter through several meetings. During the meetings, Richard agreed to commit the murder, informed the others how he would dispose of the weapon, agreed on a fee of $6000.00, and worked out an arrangement by which McGuire would know the deed had been done. Richard told the others he wanted to perform the hit within a week and asked McGuire for a down payment of $1500.00. McGuire later gave him an envelope with money supplied by the police. McGuire was also supposed to give Richard the name and address of the victim, but instead told Richard he would call and furnish the information later. When McGuire left the meeting, Richard was arrested for the conspiracy to commit first degree murder. **Richards**, 426 So.2d at 1315-16.

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16. The case is captioned "**State v. Richards.**" We note, however, that the text of the case refers to the defendant as "Richard." For the purpose of this opinion we will use "Richard" to refer to the defendant and "Richards" when referring to the case.

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In discussing the overt act requirement, the court noted it could be any act accompanying or following the agreement done in furtherance of the object of the agreement. The court further noted that the initial agreement to commit the murder was consummated at the first meeting between McGuire and Richard. The second meeting, used to transmit the victim's name and the down payment, was in furtherance of the conspiracy. The court quoted with approval language from **State v. D'Ingianni**, 217 La. 945, 47 So.2d 731, 733 (1950), as follows:

> Any act, *such as a visit by one of the parties to his coconspirator for the purpose of discussing details*, might suffice as an overt act to complete a criminal conspiracy although such an act would be regarded as merely preparatory in a prosecution for an attempt. [Emphasis added by court in Richards]

The court then concluded that the evidence was sufficient. **Richards**, 426 So.2d at 1317.

D'Ingianni involved a charge of conspiracy to defraud an insurance company by the defendant's filing a false claim on jewelry supposedly taken during a faked robbery. **D'Ingianni**, 47 So.2d at 731-32. The information alleged that two of the conspirators rode in a car with the third (the insured) from Canal Street to a location outside of New Orleans and "thereafter left the said D'Ingianni on the pretense of having taken the said D'Ingianni by force and violence in said automobile and by force and violence robbed

said D'Ingianni of the aforesaid items of jewelry. . ." **D'Ingianni**, 47 So.2d at 732.

The defendant claimed the bill failed to properly charge conspiracy because it did not allege the conspirators committed an act in furtherance of the conspiracy. Noting the bill of information alleged the men had ridden in the car together, the court then concluded as follows:

> The complaint of counsel for appellant is founded upon the fallacious theory that some step would have had to be taken by one or more of the conspirators with respect to the insurance company in order to have set the conspiracy in motion. In arguing thus, counsel confuse the overt act in the crime of conspiracy with that required for an unlawful attempt to commit an offense as denounced by Article 27 of the Criminal Code. In conspiracy, it is the combination of minds in an unlawful purpose which is the foundation of the offense. [Citations omitted.] The reason why an overt act is required in order for a conspiracy to be punishable "is to afford a locus poenitentiae, when either or all the conspirators may abandon the unlawful purpose." [Citations omitted.] As above stated, the overt act may be any act in furtherance of the agreement; a fortiori, it is not necessary that it constitute the crime and the question whether it serves to support the object of the conspiracy is one of fact for the jury. On the other hand, it is necessary, in prosecutions for attempt, for the State to prove an overt act

> tending directly toward the accomplishment by the accused of his object to commit the offense intended; mere preparation is not enough. Article 27, Cr. Code. Any act, such as a visit by one of the parties to his co-conspirator for the purpose of discussing details, might suffice as an overt act to complete a criminal conspiracy although such an act would be regarded as merely preparatory in a prosecution for an attempt.

D'Ingianni, 47 So.2d at 733.

Herein, the defendant essentially argues that the conspirators had to "do" something in furtherance of the conspiracy to kill Deborah Tsolainos. However, the conspirators did not need to perform some action that would constitute or would be part of an actual attempt to commit the crime. Under **D'Ingianni** and **Richards**, once the defendant asked Branigan to kill the victim and Branigan agreed, the additional acts of agreeing on a price, working out a method by which defendant could let Branigan know if it were safe for him to return to St. Tammany Parish, agreeing to furnish a photograph of Deborah Tsolainos to Branigan, and Branigan's contacting Schmolke, were acts taken in furtherance of the conspiracy. All of those actions are found in defendant's own statement. Although no down payment was made and defendant's statement actually indicated there may have been a misunderstanding as to the actual price, a price for the act was clearly discussed. While defendant claimed he was trying to avoid Branigan, the defendant admittedly discussed the act with Branigan more than once, but never withdrew from the conspiracy.

Thus, the trial court's conclusion that a basis under **Prieur** was established was correct. This argument lacks merit.

Hearsay

To admit the otherwise inadmissible out-of-court statements, La. Code Evid. art. 801(D)(3)(b) required the state to make a prima facie showing of the existence of the conspiracy. Defendant contends that the state failed in its burden. He avers that because Schmolke was never part of the alleged conspiracy, the recorded conversation between him and Branigan was inadmissible hearsay.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." La. Code Evid. art. 801(C). If such a statement is offered for any other purpose, such as proof only that the statement was made, then the statement is not hearsay. **State v. Thomas**, 589 So.2d 555, 568 (La. App. 1st Cir. 1991); **State v. Byrd**, 540 So.2d 1110, 1113 (La. App. 1st Cir.), *writ denied*, 546 So.2d 169 (La. 1989).

La. Code Evid. art. 801 provides in pertinent part as follows:

> D. Statements which are not hearsay. A statement is not hearsay if:
>
> (3) Relational and privity admissions. The statement is offered against a party, and the statement is:
>
> * * * *

> (b) A statement by a declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of the conspiracy, provided that a prima facie case of conspiracy is established. . . .

La. Code Evid. art. 801(D)(3)(b).

"A prima facie case of conspiracy is presented when the state introduces evidence which, if unrebutted, would be sufficient to establish the facts of the conspiracy." **State v. Lobato**, 603 So.2d 739, 746 (La. 1992). Hearsay evidence can be used to determine the prima facie case. *See* **State v. Myers**, 545 So.2d 981 (La. 1989); La. Code Evid. art. 104(A). A trial court's determination as to whether the state has made a prima facie showing of a conspiracy will not be overturned absent clear error. *See* **Lobato**, 603 So.2d at 746-47.

In **Lobato**, the Louisiana Supreme Court considered a claim that tapes recorded with the assistance of a confidential informant were admissible. The Court concluded that the tapes were admissible as non-hearsay. The false statements contained within the tapes were not made in furtherance of the conspiracy and were presented to the jurors as false statements intended to induce the co-conspirators to act. The true statements by defendant were admissible as admissions against his own interest. The true statements by the other conspirators were found admissible as statements in furtherance of the conspiracy. **Lobato**, 603 So.2d 745-46.

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In the instant case, to prove the requisite prima facie case of conspiracy, the state introduced the testimony of Detectives Robert Juge and John Scallan, both of whom had extensive and intimate knowledge of the conspiracy investigation that led to the defendant's arrest. The state also offered the transcript and audio recording of the June 30, 1998 meeting between co-conspirator Branigan and the confidential informant Schmolke. During the meeting, Branigan solicited Schmolke's participation and explained the murder plans agreed on by the defendant and himself. The state also introduced the taped statement the defendant provided to police upon his arrest on the conspiracy charge. In the statement, the defendant admitted that he and Branigan had several conversations during which they established a price and method for the murder, and devised a plan to protect the perpetrators from returning to St. Tammany Parish if the plan to make the death appear accidental went awry. As previously noted, the standard for a prima facie case is the establishment of facts which, if unrebutted, would establish the facts of the conspiracy. In this case, defendant's statement alone supports the existence of the conspiracy. The recorded conversation between Branigan and Schmolke, which further indicates the defendant's knowledge of and participation in the conspiracy, serves to bolster the prima facie case. Thus, we find the state provided sufficient evidence to show a prima facie case of conspiracy.

The trial court correctly determined that the statements made by Branigan in the recorded conversation constitute non-hearsay statements by a co-conspirator. However, Schmolke's statements, made while acting as an informant, cannot be considered non-hearsay co-conspirator statements

pursuant to La. Code Evid. art. 801(D)(3)(b). Nevertheless, we agree with the trial court's ruling and rationale admitting Schmolke's statements in the recorded conversation into evidence. Schmolke's statements were offered to provide context for Branigan's statements and not to prove the truth of the matters asserted therein. Furthermore, the court cautioned the jury that Schmolke's statements in the recordings were to be considered only to place Branigan's statements in context. Accordingly, we find that Schmolke's statements are not hearsay. *See* La. Code Evid. arts. 801(C) & (D)(3)(b). This argument has no merit.

Right of Confrontation

Additionally, defendant argues that he was denied his right of confrontation by the admission of recorded conversations. In support of his claim, he cites Schmolke's suicide prior to trial, and Branigan and Melissa Tsolainos's assertion of their Fifth Amendment privilege against incriminating themselves and their refusal to testify.

In **Ohio v. Roberts**, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Supreme Court resolved the relationship between the rules of hearsay and the Confrontation Clause. The Court held:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without

> more in a case where the evidence falls within a firmly rooted hearsay exception.

Ohio v. Roberts, 448 U.S. at 66, 100 S.Ct. at 2539.

The co-conspirator's declaration is a firmly rooted hearsay exception. State v. Ester, 458 So.2d 1357, 1365 (La. App. 2nd Cir. 1984), *writ denied*, 464 So.2d 313 (La. 1985). From our review of this record, we find that the contested statement in the instant case was a co-conspirator's statement with referential "indicia of reliability." Thus, its admission into evidence was not a violation of the confrontation clause. This argument lacks merit.

ASSIGNMENT OF ERROR NUMBER FIVE
ADMISSIBILITY OF EVIDENCE OF
DEFENDANT'S PAST DRUG USE

In this assignment of error, the defendant contends that the trial court erred in allowing the state to introduce evidence of the defendant's prior crack cocaine usage. Defendant objects to the court's ruling that defendant "opened the door" to the issue of his drug use and maintains that this evidence only showed he is a "bad man" and was not relevant. Defendant also contends that the trial court erred in allowing the state to use Doctors Salcedo and Thompson as rebuttal witnesses.

In response to the defendant's pleas of not guilty and not guilty by reason of insanity in this case, the trial court appointed Dr. John Thompson and Dr. Raphael Salcedo to examine the defendant and determine his competency to stand

trial and his sanity at the time of the commission of the alleged offense. After hearing evidence from Dr. Thompson and Dr. Salcedo, the trial court concluded that defendant was competent to proceed. During his interviews with each doctor, defendant admitted to prior use of crack cocaine, as recently as the day he met with Branigan, within a month or so of the victim's death. Defendant indicated he was a recreational cocaine user and consumed approximately $200.00 worth of cocaine any given weekend.

At trial of this matter, the defendant presented the testimony of Dr. Edward W. Carnes, a human factors engineer. Dr. Carnes was accepted as an expert ergonomist and human factors engineer for purposes of his testimony. His task was to consider the potential for human error, specifically, control misapplication, during defendant's use of the car during this incident. In connection with his evaluation, Dr. Carnes examined the design of other Buick Skylarks; reviewed the depositions of Clarissa Tsolainos, Connie Deville, and Betty Ann Rodriguez; the police reports; the defendant's recorded statements; the reports of the sanity commission doctors; and a videotape of the car and the scene of the incident.

Dr. Carnes testified regarding the design of the Skylark, observing that the levers for the windshield wiper and the gearshift were similar in size and shape, were located on the same side of the steering column, and operated in the same direction of movement. He opined these "design defects" could cause "control misapplication" with potential for operator error in reaching for one lever, but inadvertently hitting the other. He explained, if the operator intended to

push a lever up, the windshield wipers either activated, or the car would go into reverse, depending on the lever.

Dr. Carnes evaluated the situation considering defendant's account that immediately before the incident, the victim was yelling, hitting the car, and attempting to climb up the front end and that the defendant intended to back out of the driveway and leave. He opined that the defendant suffered from "hypervigilance" or panic caused by stress induced either by defendant's inadvertently engaging the windshield wipers, as claimed by defendant, or by the victim's actions. According to Dr. Carnes, the defendant's hypervigilant condition explains why defendant, in a state of confusion, was unable to stop the car during the incident. He opined that hypervigilance and control misapplication "are reasonable explanations for the incident." Dr. Carnes conceded, however, that "any stress" could have induced the hypervigilance.

During cross-examination, Dr. Carnes conceded that an intentional act could have caused the incident and related that the documents he examined contained "so many discrepancies" that it was hard for him to put it all together as a scientist. There was some reference to the emergency brake, but his understanding was that it was functional. Dr. Carnes indicated he was unaware that the defendant originally told Clarissa that a malfunction in the vehicle's emergency brake was the cause of the accident. There was no gas pedal-brake confusion.

Next, the defendant presented testimony from Dr. John Wilson, a psychologist. Dr. Wilson was asked to assess what, if any, psychological factors impacted defendant's behavior on the day of the incident, particularly in respect to operation of the Buick Skylark vehicle. Dr. Wilson concluded that defendant suffered from "post-traumatic stress disorder, chronic" and "generalized anxiety disorder, and dysphemia disorder (mild depression)." He concluded that those conditions were caused by the victim's history of addiction to prescription medications, heroin, and her behavior during that period of their lives.

In a hearing outside the presence of the jury, the court heard Dr. Wilson's testimony as to whether he considered relevant the information on defendant's drug use. He opined it was not, considering that he had no information that defendant used drugs on the day of the incident. Dr. Wilson conceded that crack cocaine was highly addictive. He further conceded, hypothetically, that if defendant had used crack cocaine as recently as a couple of weeks prior to the incident, withdrawal from the drug could have contributed to "defendant's rageful state" at the time of the incident.

At the conclusion of this hearing, the court found that:

> . . .the defendant cannot raise the issue of his mental state and preclude his relative recent use of crack cocaine which has a profound effect upon a person's mental condition and even outward manifestations of that condition.

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> The court determines that the prior crack cocaine usage could be relevant on questioning this expert's report that was prepared in connection with these proceedings.

The court ruled that issues regarding the defendant's prior, but fairly recent, drug usage, and what effect, if any, it had on his actions on the date in question, were issues for the jury to decide.

Thereafter, the state notified the court and the defendant that it planned to call Drs. Salcedo and Thompson to rebut the defendant's evidence regarding his mental and emotional state at the time of the incident. The defendant objected and a hearing was held. The court heard testimony from Drs. Salcedo and Thompson outside the presence of the jury. Both doctors indicated that prior to examining the defendant they informed him of the non-confidential nature of the interview. During his examination with both doctors, the defendant indicated he recreationally used marijuana and crack cocaine. Both doctors testified regarding the possible effects of cocaine usage and withdrawal symptoms, and how they would impact the validity of the diagnosis of Drs. Carnes and Wilson. The doctors also testified regarding the defendant's state of mind at the time of the commission of the incident.

The defendant in this case entered a plea of not guilty and not guilty by reason of insanity. In connection with the pleas, the defendant presented expert testimony suggesting the cause of the incident was stress-induced hypervigilance. By entering this plea and presenting this defense, the

defendant tendered the issue of his mental state at the time of the incident. Therefore, Drs. Salcedo's and Thompson's testimony regarding their assessment of the defendant's mental condition at the time of the offense and any factors that would have directly affected it is genuinely relevant to the issue tendered to the jury. "By claiming, (sic) the benefits of his plea of insanity, he cannot offer that from the past or present which is favorable to his contention, but at the same time withhold from the jury's consideration (if the state offers it) that which is unfavorable to his plea." **State v. Brown,** 619 So.2d 692, 695-96 (La. App. 4th Cir. 1993). We agree.

This argument lacks merit.[17]

ASSIGNMENT OR ERROR NUMBER SIX MOTION FOR A NEW TRIAL

In this assignment of error, the defendant contends that the trial court erred in denying his second motion for a new trial in light of newly discovered evidence that Clarissa Tsolainos and George Deforrest presented perjured testimony at trial.[18] This evidence, the defendant contends, renders the

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17. In this assignment of error, the defendant also argues the state failed to provide **Prieur** notice regarding its intent to use evidence of his prior drug usage. The record in this case reveals this argument was not presented in the trial court. Because the defendant's basis for argument on appeal is different from the argument presented at the hearing below, this issue has not been preserved for appellate review and will not be considered. La. Code Crim. P. art. 841.

18. The defendant filed two motions for a new trial. In the first motion, the defendant sought a new trial based on allegations concerning juror Mark Berryhill.

state's overall evidence insufficient and warrants a new trial. Defendant further argues that the trial court erroneously acted as a thirteenth juror in deciding his new trial motion.

Grounds for seeking a new trial are set forth in La. Code Crim. P. art. 851. That article provides in pertinent part:

> The court, on motion of the defendant, shall grant a new trial whenever:
>
> * * * * *
>
> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty. . . .

Thus, under Article 851(3), a new trial shall be granted when: "(1) new evidence was discovered after trial; (2) the new evidence is material; (3) the failure to discover the evidence was not due to a lack of diligence on the part of the defense; and (4) had the evidence been introduced, the verdict or judgment of guilty probably would have been changed." **State v. Watts**, 2000-0602, p. 6 (La. 1/14/03), 835 So.2d 441, 447. In evaluating whether or not the newly discovered evidence warrants a new trial, the test to be employed is not simply whether another trier of fact might render a different verdict, but whether the new evidence is so material that it

should produce a verdict different from that rendered at trial. **State v. Henderson**, 99-1945, p. 15 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 758, *writ denied.* 2000-2223 (La. 6/15/01), 793 So.2d 1235. The trial court's denial of a motion for new trial will not be disturbed absent a clear abuse of discretion. **State v. Maize**, 94-0736, pp. 27-28 (La. App. 1st Cir. 5/5/95), 655 So.2d 500, 517, *writ denied*, 95-1894 (La. 12/15/95), 664 So.2d 451.

At a hearing on the second motion for a new trial, Cherie Breaux, an acquaintance of Clarissa, testified that during a conversation at a birthday party of Clarissa's younger brother Stephen, Clarissa stated "George [Deforrest] lied for me on the stand and I owe him $20,000 or a truck. . . ." Although Breaux surmised that Clarissa was referring to the defendant's criminal trial, Breaux admitted, on cross-examination, that Clarissa did not mention a specific trial, criminal or civil. Breaux further testified that Clarissa did not reveal the substance or nature of the lie.

David Showalter testified that he overheard the conversation wherein Clarissa told Breaux that Deforrest lied for her in court. Like Breaux, Showalter indicated that Clarissa did not specifically say which court proceeding she was referring to and did not provide the substance of the lie.

Next, Jessie Polk, whose wife is an acquaintance of Clarissa, testified that once, while out partying, Clarissa indicated that she was not present when the defendant ran over the victim. On another occasion, according to Polk, when Clarissa was staying with him and his wife, she broke down and cried, stating that she had not witnessed the incident in question because she was not outside.

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Sheree Bossier (Sheree), Mr. Polk's wife, testified that she and Clarissa became friends when Clarissa was placed in the Bossier home as a foster child back in 1994 or 1995. Bossier testified that on the day the incident occurred, she received a call indicating that Clarissa's mother had been injured. Sheree stated she and her mom went to the Morgan Bluff Road residence, and Stephen Tsolainos stated that when the incident occurred, "he had to run inside and get his sissy [Clarissa] to come outside because he was scared, he didn't know what to do." On cross-examination, when informed that Stephen provided a statement indicating that Clarissa was outside and questioned as to whether she misunderstood Stephen's comment to her, Sheree indicated she heard him clearly, but stated that Stephen "could have possibly been confused too." Sheree further testified that on at least three separate occasions Clarissa told her that she was not outside when the incident occurred.

Pat Bossier, Sheree's mother and an acquaintance of the Tsolainos family, also testified. Mrs. Bossier testified that she was present on the night of the incident when Stephen indicated that he had to run inside and get Clarissa after his dad ran over his mom. She further testified that Clarissa, on one other occasion, stated that she and Deforrest were not outside when the incident occurred.

In opposition to the motion for new trial, the state presented the testimony of Det. Juge. In his testimony, Det. Juge indicated that shortly after arriving at the Morgan Bluff Road residence on the night of the incident, he obtained recorded statements from Clarissa, Deforrest, and Stephen. Det. Juge testified that every statement taken in connection

with his investigation of the incident, including the statement taken from the defendant, indicated Clarissa was outside.

Det. Juge testified that Stephen, in his statement, indicated, "Clarissa saw the wreck." Det. Juge further testified that in her statement on the night of the incident, Clarissa indicated that she had been outside when the defendant ran over the victim. She also indicated that she and her sister, Stephanie, were also hit with the vehicle. Det. Juge further testified regarding the taped statement he took from the defendant on the night of the incident. In the statement, while describing the verbal encounter between him and the victim, the defendant indicated, "I was trying to tell Clarissa who I was yelling at," thereby indicating that Clarissa was outside.

Clarissa also testified at the hearing. She denied ever telling anyone she was not outside. Clarissa testified that her prior testimony at the defendant's trial was truthful. Clarissa explained that the testimony of the defendant's witnesses at the hearing was untrue and motivated by money.

A copy of a tape of the call Clarissa made to 911 was introduced at the hearing and played for the court. During the call, Clarissa indicated that her father ran over her mother. Clarissa told the operator that the vehicle also struck her and her sister.

Deforrest testified he was not given anything for his testimony at the defendant's trial. He further testified that Clarissa was outside when the incident occurred and went inside afterwards.

At the conclusion of this hearing, the trial court denied the motion for a new trial. The trial court provided oral reasons for its ruling.

Subsequently, on August 19, 2002, in connection with his contention that Clarissa and Deforrest provided perjured testimony at his trial, the defendant filed a Motion to Reset the Motion for New Trial for the Taking of Additional Evidence. On February 25, 2003, the trial court reopened the hearing.

At the February hearing, Clarissa, now a witness for the defense, testified that she was on probation when she testified at the first new trial hearing. Clarissa testified that, as she understood it, there was a warrant for her arrest outstanding at that time. She stated that on the date of the first hearing she spoke with her probation officer prior to appearing to testify. Clarissa claimed her probation officer, Dena Lopez, asked Clarissa if she could pass a drug screen that day. Clarissa responded that she would not. Clarissa testified that she would not have been able to pass a drug screen because she was under the influence of marijuana and Xanax at that time.

Clarissa also testified regarding a written statement she provided to defense counsel on January 14, 2002. In her statement, Clarissa admitted she was under the influence of Xanax at the first hearing. She further indicated that the assistant district attorney who prosecuted the defendant's case had her warrant lifted and "was giving [her] a second chance since [she] had violated probation." Clarissa also indicated she could have said she "lied on the stand" as Cherie Breaux

indicated in the first hearing. Clarissa explained that she did not recall exactly what she lied about, except her statement indicating that her mother hadn't been drinking on the day she was killed. Clarissa went on to admit that the victim "had become an alcoholic at the time. Not on heroin but she did drink a lot." Towards the end of the statement, Clarissa indicated that she could have said that Deforrest wanted her to give him some money or buy him a truck, but she did not recall making that statement.

On cross-examination, Clarissa again admitted that she had lied about the victim's alcohol consumption on the day of the incident. However, Clarissa unequivocally stated that she did not lie about what she saw that evening. Clarissa further stated that her offer to give Deforrest money or help him get a truck was unrelated to his testimony at the defendant's criminal trial.

Sam Gebbia, a felony investigator for the District Attorney's office, accompanied Clarissa to see her probation officer on the day of the first hearing. He testified that Clarissa never indicated that she would have failed a drug screen.

On the second day of the hearing, Dena Lopez, Clarissa's probation officer, testified that she met with Clarissa on November 26, 2001, to discuss the conditions of her probation. During this meeting, Clarissa was five or six months pregnant. Clarissa told Lopez that she violated her probation because she did not have any money to pay her fines and monthly probation fees. Clarissa further explained the additional hardships she was experiencing, particularly putting her child up for adoption in California. Lopez

testified, although the prosecutor in the defendant's case had called Lopez and asked for leniency in regards to Clarissa's probation violation, that she would have given Clarissa a second chance anyway. Lopez denied Clarissa ever stated that she would fail a drug screen.

On appeal, the defendant alleges that the testimony presented at the motions for a new trial, particularly Clarissa's testimony regarding the victim's alcohol consumption, probably would have produced a different verdict. He asserts, had the jury been aware of the state of the victim's alcohol consumption, it probably would have concluded the victim was the aggressor in the incident, which, he avers, would have resulted in a different verdict. The defendant further contends that had the jury been aware of Clarissa's promise to give Deforrest money, it would have possibly disregarded Deforrest's testimony regarding the comment made by the defendant upon exiting the vehicle.

In its initial ruling on the second motion for new trial, the court stated:

> It is the duty and responsibility of the court to evaluate the witnesses' testimony and give what weight the court feels that that testimony deserves. Thus, it becomes an issue of credibility of the witnesses and also not only for the hearing that is before the court today; but the credibility of the witnesses that testified before the trier of facts, which is a jury of twelve persons, here in this very courtroom.

> The court after giving the credit that it feels the witnesses deserves comes to the conclusion that the defendant is not entitled to a new trial.

As previously noted, when ruling on a motion for new trial based upon newly discovered evidence, a trial court's duty is not to weigh the new evidence or "determine what is true or false in light of the additional information." **State v. Watts**, 2000-0602 at pp. 8-9, 835 So.2d at 448. Thus, it appears the trial court applied an incorrect standard in deciding this motion for a new trial.

However, the trial court further found that the evidence of Clarissa's testimony would not change the jury's verdict, a finding based on the correct standard. The court did not find Clarissa's testimony regarding the victim's alcohol consumption to be material because this issue was adequately put before the jury at trial. In addition, the court concluded that evidence presented, regarding whether Clarissa gave or intended to give Deforrest money, did not show that Clarissa was compensating Deforrest for his testimony at the criminal trial.

We find no error in these conclusions. Although Clarissa admitted she lied about the victim's alcohol consumption, we note, as did the trial court, this issue was already before the jury by virtue of Dr. MacKenzie's testimony and the autopsy report. Everyone who was present at the scene, including Clarissa and Deforrest, testified that the victim was angrily beating on the hood and the windshield of the vehicle while yelling profanities. Even in light of this evidence and the trial court's instruction on the possibility of the responsive

verdict of manslaughter, the jury convicted the defendant of second degree murder. Thus, it is clear that evidence of the victim's alcohol use, and Clarissa's admitted perjury on that issue, would not have changed the outcome.

As to the testimony indicating that Clarissa allegedly stated she was not outside, we note that, from the moment she made the 911 call until her testimony at the second motion for a new trial, Clarissa never wavered in her claim that she personally witnessed the incident. Likewise, Deforrest, in his statement to police on the night of the incident, his subsequent testimony at the defendant's trial, and his testimony at the motion for new trial, consistently indicated that Clarissa was outside during the incident. Given the consistency of this evidence, and the other evidence submitted at trial, we are unable to conclude that the contrary testimony, of individuals admittedly acquainted with the defendant, would have produced a different verdict or would have changed the jury's verdict.

Therefore, after a careful review of the record, we do not find that defendant has met all the requisites for the granting of his motion for new trial based upon newly discovered evidence. Although the trial court may have articulated the incorrect standard in its reasons for denying the motion, the end result was correct. The defendant's motion for a new trial was properly denied. This assignment of error lacks merit.

Appendix A

ASSIGNMENT OF ERROR NUMBER SEVEN
BRADY VIOLATIONS

In this assignment of error, with little or no elaboration or argument, the defendant lists twenty-two instances wherein he contends that the state withheld or suppressed information favorable to him, in violation of open-file discovery and **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The defendant argues that the state's failure to disclose the referenced items warrants reversal of his conviction. In response, the state avers that the items referred to by the defendant (1) were produced at trial and do not constitute the sort of Brady violations discussed in the jurisprudence, (2) were clearly not relevant or not Brady material, or (3) did not exist or were events that occurred after the trial of this matter.

The purpose of pretrial discovery procedures is to "eliminate unwarranted prejudice [to a defendant] which could arise from surprise testimony." **State v. Mitchell**, 412 So.2d 1042, 1044 (La. 1982). Discovery procedures enable a defendant to properly assess the strength of the state's case against him in order to prepare his defense. **State v. Roy**, 496 So.2d 583, 590 (La. App. 1st Cir. 1986), *writ denied*, 501 So.2d 228 (La. 1987). If a defendant is lulled into a misapprehension of the strength of the state's case by the failure to fully disclose, such a prejudice may constitute reversible error. **State v. Ray**, 423 So.2d 1116, 1118 (La. 1982).

Under the United States Supreme Court decision of **Brady**, the state, upon request, must produce evidence that

is favorable to the accused where it is material to guilt or punishment. This rule has been expanded to include evidence that impeaches the testimony of a witness where the reliability or credibility of that witness may be determinative of guilt or innocence. **Giglio v. U.S.**, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Where a specific request is made for such information and the "subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge" for an in camera inspection. **U.S. v. Agurs**, 427 U.S. 97, 106, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976); *see* **State v. Cobb**, 419 So.2d 1237, 1241 (La. 1982).

The test for determining materiality was firmly established in **U.S. v. Bagley**, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and has been applied by the Louisiana Supreme Court. **State v. Rosiere**, 488 So.2d 965, 970 (La. 1986). The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. **Bagley**, 473 U.S. at 682, 105 S.Ct. at 3383.

After a thorough review of the record for each alleged violation, and consideration of the applicable legal precepts, we find that the defendant has failed to demonstrate any prejudice to his case or that the information would have changed the result of the trial. In both his original and reply

briefs, the defendant merely cites what he alleges to be violations of **Brady** and open-file discovery procedures, then generally asserts that he was prejudiced. The defendant fails to specify what "favorable evidence" was withheld from him, and does not provide any focused argument on how the alleged breaches specifically prejudiced his case or how disclosure to defense counsel would have changed the result. Even if a discovery or **Brady** violation did occur in any of the instances referenced by the defendant, it would not constitute reversible error without actual prejudice to the defendant's case. *See* **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *see also* **State v. Francis**, 2000-2800, pp. 5-6 (La. App. 1st Cir. 9/28/01), 809 So.2d 1029, 1033. Furthermore, the record does not reflect any manner in which defendant might have been lulled into a misapprehension of the strength of the state's case. For these reasons, we find that this assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER EIGHT
SUPPRESSION OF DEFENDANT'S CONFESSION

In this assignment of error, defendant claims his taped statement of July 20, 1998, following his arrest for the murder charge, should have been suppressed. Defendant claims the statement was involuntary because it was made in response to inducements by Det. Juge. Defendant also claims the statement itself contains a number of bizarre references, which should have caused serious concern for his state of mind.

Appendix A

Prior to trial, the defendant filed a motion to suppress his taped statements.[19] Along with several complaints regarding the chain of custody, problems with the transcripts, and condition of the tapes, the defendant argued the statements were in violation of his constitutional rights. As to the July 20, 1998 statement, the defendant argued it should have been suppressed because (1) it was induced by a promise to release his girlfriend, and (2) he was under the influence of an obvious mental impairment at the time he gave the statement. Following a hearing, the trial court denied the motion. Defendant filed a supervisory writ application with this court seeking review of the trial court's ruling on the motion to suppress. In an unpublished decision, this court denied the writ application. State v. Tsolainos, 99-2401 (La. App. 1st Cir. 10/08/99). Defendant then filed a supervisory writ application with the supreme court, which also was denied. State v. Tsolainos, 99-2885 (La. 10/11/99), 748 So.2d 457.

Although a pretrial determination of the admissibility of evidence does not absolutely preclude a different decision on appeal, "judicial efficiency demands that this court accord great deference to its pretrial decisions on admissibility unless it is apparent, in light of a subsequent trial record, that the determination was patently erroneous and produced an unjust result." **State v. Johnson**, 438 So.2d 1091, 1105 (La. 1983); *see* **State v. Humphrey**, 412 So.2d 507, 523 (La. 1982) (on rehearing).

---

19. The defendant made two separate taped statements. His first statement was made on July 7, 1998, following his arrest on the conspiracy charges. The second taped statement, on July 20, 1998, was made following the defendant's arrest for the instant offense.

By this assignment of error, defendant again seeks review of the trial court's ruling denying his motion to suppress his July 20, 1998 taped statement.[20] However, the assignment of error presents no new argument. The record in this case fully supports our previous decision on the issue presented in the writ application and is devoid of any additional evidence that would lead us to change the conclusion we previously reached. Accordingly, we maintain our previous finding that the defendant's statement was freely and voluntarily given. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER NINE
MOTION TO QUASH INDICTMENT

In this assignment of error, the defendant contends that the trial court erred in failing to grant his motion to quash the indictment. The motion was based on the state's failure to record or transcribe the grand jury proceedings. The defendant, who wished to search for inconsistencies in testimony, argues that the state's failure to record and transcribe the grand jury proceedings in this case warrants reversal of his conviction.

On October 5, 1999, the defendant filed a Motion and Order for In Camera Inspection of Grand Jury Testimony based upon alleged inconsistent statements by Detective Juge and Clarissa Tsolainos. In response to this motion, the state, in its Answer to Defendant's Request for Supplemental

---

20. Although the defendant mentions both of his statements in his assignment of error, he provides argument on his second statement only. Thus, the defendant has abandoned any error assigned to the first statement.

Discovery, indicated that a transcript of the grand jury proceedings did not exist. Consequently, the defendant filed a Motion to Re-urge the Motion to Quash the Indictment alleging that the state's failure to record the grand jury proceedings violated several constitutionally guaranteed rights.[21] A hearing was held on October 12, 1999, at the conclusion of which the trial court denied the motion, stating:

> *** In regard to the motion to reurge the motion to quash the indictment on the grounds that the grand jury proceedings involving this case were not transcribed and thus putting the defendant at a disadvantage, the Court would reflect that a grand jury is an accusatory body. There is no particular provision in the law that absolutely requires all proceedings of a grand jury be transcribed. And thus the Court, when confronted with a situation where there's no transcript of the grand jury proceedings involving the indictment in this case, the Court cannot order something to be produced that doesn't exist.
>
> And the Court finds further that in light of the law in not requiring it and that it's discretionary and that based on the argument that historically the proceedings of the grand jury are not transcribed, this Court denies the motion to quash the indictment.

---

21. In his motion to quash, the defendant stated, "[w]hen the State chose not to transcribe the grand jury proceedings, thereby assuring that Mr. Tsolainos could not receive a copy, they violated the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution."

The defendant's claim is unfounded. The trial court correctly noted that there is no provision in the law that requires all grand jury proceedings be recorded or transcribed. La. Code Crim. P. art. 433, which lists the persons who "may" be present at the sessions of the grand jury, is permissive. The language of the statute merely allows for "a person sworn to record the proceedings of and the testimony given before the grand jury" to be present during grand jury sessions. La. Code Crim. P. art. 433; *see also* La. Code Crim. P. art. 441. Contrary to the defendant's assertions, nothing in the language of the statute or in any existing Louisiana jurisprudence mandates the presence of such an individual or that the proceedings be recorded.

Moreover, as a general rule, grand jury proceedings are to be kept secret. **State v. Ates**, 418 So.2d 1326, 1329 (La. 1982). "While there may be instances in which a party's need for grand jury materials outweighs the need for continued secrecy, that need must be demonstrated with particularity." **State v. Sims**, 32,461, p. 3 (La. App. 2nd Cir. 10/27/99), 745 So.2d 151, 155, *writ denied*, 99-3384 (La. 5/12/00), 762 So.2d 71, citing **State v. Trosclair**, 443 So.2d 1098, 1103 (La. 1983), *cert. dismissed*, 468 U.S. 1205, 104 S.Ct. 3593, 82 L.Ed.2d 889 (1984).. The burden is on the party requesting the transcript to show great prejudice or injustice. A general request for transcripts "does not satisfy the requirement of demonstrative particularized need." *Id.*

We cannot find that the defendant's request to inspect the grand jury transcripts, wherein he sought to discover whether any inconsistent statements existed, sufficiently meets the threshold requirement of showing a particularized

need. Accordingly, the defendant has failed to show how the absence of recorded or transcribed proceedings prejudiced his constitutional rights or warranted a reversal.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TEN
ERRORS PATENT

In his final assignment of error, the defendant requests that this court examine the record for errors patent. Because this court routinely reviews the record for errors patent, such a request is unnecessary. Under La. Code Crim. P. art. 920(2), our patent error review is limited to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After review of the record in these proceedings, we find no errors patent.

For the foregoing reasons, defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.

APPENDIX B — MINUTES OF TRIAL COURT REGARDING SENTENCING

Wednesday, April 26, 2000

COURT MET THIS DAY PURSUANT TO ADJOURNMENT, PRESENT AND PRESIDING, HIS HONOR, DONALD M. FENDLASON, JUDGE DIVISION "H", RONALD T. GRACIANETTE AND SCOTT GARDNER, ASSISTANT DISTRICT ATTORNEY'S, RODNEY J. STRAIN, JR., SHERIFF AND MALISE PRIETO, CLERK OF COURT (BAILIFF, CHERYL HANSON AND COURT REPORTER, CYNTHIA GEBBIA)

290874H

STATE OF LOUISIANA

VS

PANOS TSOLAINOS

The defendant being present in open Court attended by his Counsel, Robert Stern and Kim Abramson and this matter being on assignment for a motion for New Trial, the Defense at this time request the sequestration of all witnesses, which Court so ordered and same was done.

The Defense at this time read into the record items which he requested that the Court take Judicial Notice of and the Court so noted.

Appendix B

The Defense at this time offered, introduced and filed into evidence the following item:

D-14 Transcript from the trial of Gerald Brannigan and Melissa Tsolainos held on January 26, 2000

Evidence was heard on behalf of the Defense with the following witness giving testimony:

1. Ron Frazier

The Defense at this time offered, introduced and filed into evidence the following items:

D-1 St. Tammany Parish Sheriff's Office Case Resume for Item #07-0318-98

D-2 Det. Scallan's field notes regarding Item 87-01318-98

D-3 Transcript of statement taken from Joy Kahl on February 15, 2000

D-4 Transcript of statements taken from Mark B. Berryhill on February 21, 2000 and on February 29, 2000

Appendix B

Wednesday, April 26, 2000

D-4-T Envelope containing the audio tape of the statements taken from Mark Berryhill on February 21, 2000 and February 29, 2000 and the statement taken from Joy Kahl on February 15, 2000

D-5 Handwritten statement taken from Cheryl Johnson on February 24, 2000

D-6 Extract of Minute Entry from #305319 dated November 3, 1999, State of La. vs. Cheryl Johnson

D-7 Copy of incident report from Pearl River County, Mississippi in regards to Jason Turner and Charles Schmolker, Case #MR140-95

D-8 Copy of Indictment from Pearl River County, Mississippi and Order of Nolle Prosse in regards to Charles Schmolker, Cause #8463-1

D-9 St. Tammany Parish Sheriff's Office Incident report on death of Charles Schmolke

D-10 Corornor's report on death of Charles Schmolke

D-11 Copy of pages from the PDR on the drug Xanax

D-12 Copy of divorce of Mark B. Berryhill #80270

D-13 Copy of divorce of Mark B. Berryhill #92-11976

Appendix B

Evidence was heard on behalf of the Defense with the following witnesses giving testimony:

2. Mark Berryhill

3. Joy Kahl

4. Cheryl Johnson

This being the noon hour, Court recessed for lunch.

The defendant being present in open Court attended by his Counsel, Robert Stern and Kim Abramson, argument was heard on behalf of the Defense and the State and submitted to the Court and Court recessed briefly.

The defendant being present in open Court attended by his Counsel, Robert Stern and Kim Abramson, Court at this time read into the record his reasons for judgment and filed same in written form. Court denied the

Wednesday, April 26, 2000

Motion for New Trial.

The Defense at this time waives formal delays in sentencing; whereupon Court imposed the following sentence:

PANOS TSOLAINOS, being over the age of 17 years of age and having previously been found guilty by a Jury of having violated R.S. 14:30.1 by committing second degree

murder of Deborah Tsolainos, Court sentences the defendant to serve a period of life imprisonment at hard labor without the benefit of parole, probation or suspension of sentence.

Upon motion of the Defense, Court ordered the defendant be held in the St. Tammany Parish Jail until Wednesday, May 3, 2000.

Court advised the defendant of the time limitations in which to file any Application for Post-Conviction Relief.

The Defense informed the Court of their intent to file a motion for Appeal, which Court will grant when the written motion is filed.

APPENDIX C — VEDICT OF THE JURY

VEDICT OF THE JURY

WE, the jury, find the defendant, PANOS TSOLAINOS,

Guilty

s/ [illegible]
FOREPERSON

October 23, 1999
DATE
COVINGTON, LOUISIANA

NUMBER: 290874

DIVISION: "H"

22nd JUDICIAL DISTRICT COURT

PARISH OF ST. TAMMANY

STATE OF LOUISIANA

s/ Connie Mays
Deputy Clerk

STATE OF LOUISIANA

VERSUS

PANOS TSOLAINOS

FILED: October 23, 1999

Appendix C

POSSIBLE VERDICTS

GUILTY;

GUILTY OF MANSLAUGHTER;

NOT GUILTY.

APPENDIX D — INDICTMENT FILED AUGUST 13, 1998

STATE OF LOUISIANA
Parish of St. Tammany

Twenty-Second Judicial District Court _____Term, 19__.

The Grand Jurors of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of St. Tammany, in the name and by the authority of the said State, upon their oath find and presents:

That one, *PANOS TSOLAINOS* late of the Parish of St. Tammany, on the *19TH* day of *JULY,* in the year of our Lord, one thousand nine hundred and *NINTY EIGHT*, in the Parish of St. Tammany, aforesaid, and within the jurisdiction of the Twenty-second Judicial District Court of Louisiana, for the Parish of St. Tammany: *4/26/99 amend to 14:30.1 Second Degree Murder*

R.S. 14:30 FIRST DEGREE MURDER, by killing DEBORAH TSOLAINOS in the second degree.

contrary to the form of the Statutes of the State of Louisiana in such cases made and provided, and against the peace and dignity of the same.

s/ [illegible]
District Attorney, 22nd Judicial
District of Louisiana

Appendix D

NO.

STATE OF LOUISIANA

versus

PANOS TSOLAINOS

INDICTMENT FOR

R.S. 14:30 FIRST DEGREE MURDER

A true bill

A TRUE BILL

s/ [illegible]
Foreman of the Grand Jury

APPENDIX E — FELONY BILL OF INFORMATION FILED AUGUST 6, 1998

FELONY BILL OF INFORMATION

STATE OF LOUISIANA – PARISH OF ST. TAMMANY

TWENTY-SECOND JUDICIAL DISTRICT

TO THE HONORABLE THE TWENTY SECOND JUDICIAL DISTRICT COURT OF LOUISIANA, sitting in and for the Parish of St. Tammany, comes now into open Court the undersigned District Attorney of the Twenty-Second-Judicial District of Louisiana, in the name and by the authority of said State, informs said Honorable Court.

That the person(s) named and identified below, late of the Parish of St. Tammany on or about the date below described, in the Parish of St. Tammany aforesaid and within the jurisdiction of the Twenty-Second Judicial District in and for the Parish of St. Tammany, State of Louisiana and contrary to the form of the Statutes of the State of Louisiana in such cases made and provided, and against the peace and dignity of the same did violate:

DEFENDANT'S NAME AND DATE OF BIRTH:

1. PANOS TSOLAINOS
2. MELISSA TSOLAINOS
3. GERALD BRANIGAN

DATE OF OFFENSE: BETWEEN THE 25TH DAY OF JUNE, 1998 AND THE 6TH DAY OF JULY, 1998

Appendix E

R.S. 14:26:30 CONSPIRACY TO COMMIT FIRST DEGREE MURDER, by conspiring to kill Deborah Tsolainos in the first degree.

s/ Walter P. Reed
WALTER P. REED
DISTRICT ATTORNEY
22ND JUDICIAL DISTRICT
STATE OF LOUISIANA

APPENDIX F — ORDER DENYING APPLICATION FOR REHEARING OF THE COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA FILED FEBRUARY 9, 2004

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

22nd Judicial District Court
Case #: 290874
St. Tammany Parish

RE: Docket Number 2000-KA-1664

STATE OF LOUISIANA

--Versus--

PANOS TSOLAINOS

On Application for Rehearing filed 01/13/2004

Rehearing *DENIED*

s/ Frank Foil
Frank Foil

s/ Brady M. Fitzsimmons
Brady M. Fitzsimmons

s/ E. James Gaidry
E. James Gaidry

Filed FEB 09 2004

s/ Christine L. Crow
Christine L. Crow, Clerk

(2)

Supreme Court, U.S.
FILED
NOV 26 2005
OFFICE OF THE CLERK

No. 04-450

IN THE

Supreme Court of the United States

PANOS T. TSOLAINOS,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
LOUISIANA COURT OF APPEAL
FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner Tsolainos's conviction by a jury for second degree murder of his exwife was supported by ample evidence, both direct and circumstantial, that he intended to "kill or to inflict great bodily harm" on Deborah Tsolainos. The facts indicated that Tsolainos got into the driver's seat of his girl friend's car parked in the victim's driveway after packing it with their belongings. Connie, the girl friend, was in the process of getting in the passenger side when Tsolainos gunned the motor and caused the car to jerk backwards. It stopped, then the motor was gunned again, the tires squealed, and the car barreled forward throwing Connie out of the vehicle, brushing Clarissa his adult daughter, and throwing her and her little sister Stephanie backwards. The car was steered deliberately into Deborah, hitting her in the middle and throwing her onto the hood. The car moved 50 to 60 feet, then up a tree and landed on its side with Deborah Tsolainos lying underneath the car.

Petitioner claimed it was an accident but the facts at trial did not support either of the two different stories that he told to the police.[1] In fact, prior to this incident, he had been arrested for conspiracy to commit murder. After his initial arrest for conspiracy, he gave a statement to the police admitting that he and Branigan had several conversations during which they agreed to a price and method for the murder of Deborah, his exwife. This statement alone established the existence of a conspiracy. It was introduced at trial. Also introduced at trial was the taped statement between Schmolke and Branigan, at issue in this Writ, when Branigan developed the specifics for murdering Deborah.

---

1. At first Tsolainos said that it was the emergency brake. Then he told the police and presented at trial the "control misapplication" theory.

This taped statement was made by co-conspirators during the course and in furtherance of the conspiracy. As a hearsay exception, it was properly admitted into evidence. However, the other contested statement, made by Melissa Tsolainos, defendant's daughter, was not introduced at trial. Melissa's statement was used at a pretrial hearing where the state proved its *prima facie* case of conspiracy. The use of hearsay has always been allowed at pretrial hearings. The pretrial use of this statement is not ripe for consideration by this court because it was not introduced at trial, nor was its substance made known to the jury. The pretrial hearing is not an issue properly presented to this court.

STATEMENT OF PROCEDURE

Petitioner, Panos Tsolainos, was charged by grand jury indictment on August 13, 1998, with the first degree murder of his ex-wife, Deborah Tsolainos, a violation of La. R.S. 14:30. On April 26, 1999, the charge was amended to second degree murder, a violation of La. R.S. 14:30.1. At the sanity hearing on February 9, 1999, the court determined that defendant was competent to stand trial based on the reports of doctors Salcedo and Thompson. On October 11-14, 1999, a twelve person jury was selected. It tried this case on October 15 through 23, 1999 and found petitioner guilty as charged. On April 26, 2000, after the court denied petitioner's motion for a new trial with reasons, it sentenced petitioner to life in prison at hard labor without benefit of parole, probation or suspension of sentence.

Petitioner appealed his conviction and sentence to the First Circuit Court of Appeal which affirmed both by written opinion, *State v. Tsolainos*, 2000-1664 (La. App. 1 Cir. 12/31/03), (unpublished opinion), *rehearing denied.* The

Louisiana Supreme Court denied the writ of certiorari, *State v. Tsolainos*, 2004-0616 (La. 7/2/04), 812 So.2d 645.

The First Circuit considered whether or not it was trial error to allow the state to introduce evidence of other crimes or bad acts. Specifically, the bad acts evidence consisted of the conspiracy evidence of defendant's participation in an alleged conspiracy to murder his ex wife. The First Circuit concluded that there was no trial court error because the state had made a *prima facie* case of conspiracy. The court also found that allowing the recorded conversation between Branigan and Schmolke to be introduced into evidence and played for the jury was not error. Thus, the trial court did not abuse its discretion in denying defendant's motion for mistrial. The court further concluded that the contested statement was a co-conspirator's statement and a firmly rooted hearsay exception that did not violate petitioner's right to confrontation.

Moreover, Mr. Branigan was convicted of conspiracy to commit first degree murder in a separate trial on January 27, 2000. His conviction and sentence were affirmed on direct appeal by the Louisiana First Circuit. *State v. Branigan*, 2000-KH-1589 (La. App. 1 Cir. 2001) (unpublished opinion); *writ denied*, 812 So. 2d 645 (La. 2002). On writ of federal habeas, the U.S. District Court, Eastern District of Louisiana, agreed with the state court that there was sufficient evidence to support the conviction for conspiracy to commit murder. *See Gerald Branigan v. James D. Miller*, No. 02-3325, USDC, E.D. of LA.

STATEMENT OF FACTS

In 1996, petitioner Panos Tsolainos and Deborah Tsolainos separated and began a custody battle for their two minor children and a fight over the community property. They had been married since 1983. Defendant was a wealthy prep school man with an MBA from Wharton College; Deborah was a welder with two children from a previous marriage, Melissa and Clarissa. Panos adopted both of Deborah's two children, and then they had two of their own: Stephen and Stephanie.

During the marriage, while recovering from a back injury, Deborah became addicted to drugs and then heroin. Her addiction to heroin contributed to the break up of the marriage. After the divorce, Deborah went to St. Louis, Missouri, to live with her mother where she entered a recovery program for her heroin addiction.[2] Petitioner was awarded custody of the minor children, Stephanie and Stephen, and occupancy of the family home. Melissa remained in Louisiana with petitioner. Clarissa, who had become pregnant at the time of the divorce, followed her mother to St. Louis where she had her baby. In the meantime, Stephanie and Stephen were in the custody of their father until Deborah was able to successfully complete her drug rehabilitation.

In 1998, Deborah, drug free and sober, petitioned the court for visitation and joint custody as well as for community property.[3] During this time petitioner began using crack cocaine, a fact that was not allowed in evidence after a hearing

2. R. 2159

3. R. 2162

on the issue on October 19, 1999. Petitioner became angry at Deborah's efforts to gain custody of the children and house, and started looking for a hit-man. To accomplish this goal, defendant's adopted daughter, Melissa Tsolainos, introduced him to Gerald Branigan. After Panos discussed killing the victim with Branigan, Branigan contacted Charles "Tinker" Schmolke to assist him in the murder of Deborah Tsolainos.

At the end of June 1998, Charles Schmolke, known as "Tinker," contacted Detective John Scallon regarding a potential conspiracy to kill Deborah Tsolainos by her ex-husband Panos. Tinker agreed to wear a wire and set up a meeting for June 30, 1998, with Gerald Branigan to record the conspiracy to murder Deborah. Tinker met with Branigan and his girl friend, Melody Johnson, and learned that Panos was trying to hire Branigan to kill his ex-wife, Deborah, for five thousand dollars ($5,000.00). Branigan had been introduced to petitioner by Tsolainos's daughter, Melissa Tsolainos. Branigan wished to recruit Tinker to assist in the murder and agreed to give him half of the payment, that is twenty-five hundred dollars ($2,500.00). At that first meeting, it was decided that one of two methods would be used to kill Deborah: (1) an armed robbery where Deborah would be shot between the eyes; or (2) set up an overdose situation with heroin as Deborah was a former addict. Branigan was to get a picture of the victim from Panos for Tinker. This meeting was recorded with a Kell monitor on Tinker while detectives listened. *See* Appendix A.

The second meeting with Branigan occurred during the day on July 1, 1998, when Branigan told Tinker that he had decided that the overdose was the best method. The third meeting was later on that same date. The recording device malfunctioned at both the second and third meetings and the

tapes were blank. The substance of these conversations were not allowed into evidence through Det. Scallon's testimony after a pretrial hearing.

Within a few days, Branigan and Melody Johnson were arrested. Both of them gave statements to the police. Melissa and Panos Tsolainos were also arrested for conspiracy to commit murder. Petitioner gave a statement after his arrest where he admitted his contact with Branigan. After Deborah Tsolainos was notified of the threats and of the arrests, she returned to Louisiana and obtained custody of the children and the house. Petitioner was released on bail on July 17, 1998, after admitting to the conspiracy.

On July 19, 1998, Deborah was cleaning the family home that had been totally trashed by defendant because she had been awarded custody of it by the court. On that Sunday morning, she was helped with cleaning the community home by her daughter Clarissa Tsolainos and Clarissa's friend George DeForest, Aunt Carlotta and her boyfriend Mark, and her two minor children Stephanie and Stephen. Clarissa's baby, Christopher, was also at the house.[4]

During the afternoon, defendant and his girlfriend, Connie DeVille, arrived from Mississippi to pick up some of Connie's personal goods that had been left in the house. Defendant initially remained across the street while Connie went to get her belongings because there was a restraining order forbidding Panos from contacting Deborah or going on the property. The children, Stephanie and Steven, wanted to see their dad so Deborah took them outside and allowed them to go across the street to see him. The atmosphere

4. R. 2168

seemed amiable. Petitioner was allowed to enter the property to help Connie load her stuff into her Skylark, then the two left. Deborah and the kids went back into the house to continue cleaning.

Sometime in the early evening, petitioner and Connie returned to the house for the rest of their personal belongings while the family was eating a McDonald's supper. Clarissa saw petitioner outside of the picture window. When Deborah noticed petitioner she said "Oh f___" and went outside. Clarissa went back to packing and cleaning. While Clarissa and George were inside cleaning the computer room they heard Deborah yelling and tires squealing outside. As they went outside they saw Panos in the car revving up the engine, spinning the wheels while in neutral. Deborah screamed at Panos and pounded on the front of his vehicle. Connie was partly in the car and Panos was revving up the engine. Deborah was yelling "Get off the property" and "You tried to kill me." Clarissa tried to get her mother inside.[5]

In the meantime, Connie was also screaming at petitioner who began backing up the car in a circular motion. Connie fell out of the car passenger door then the car barreled forward again grazing Connie, hitting Clarissa and sending her and Stephanie backwards. The engine was still very loud and the tires were squealing. The car hit Deborah in the middle, threw her in the air.[6] She landed on the hood of the car as the car ran up the tree and landed on its side on top of Deborah crushing her.[7]

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5. R. 2172-75

6. R. 2180

7. R. 2109

George had heard the ruckus and run outside with a baseball bat, but when he saw the victim pinned underneath the car and the kids crying he went to call 911 but Clarissa made the call while George went back outside. He attempted to help Deborah by getting a jack from his car to raise the vehicle off the victim. In the meantime, petitioner climbed out of the car but refused to help when asked by George and he went inside. Petitioner passed Clarissa while she was on the phone and told her that the emergency brake was the problem.[8] He also kept saying "That f-ing bitch got what she deserved, she shouldn't have been running her f___ing mouth." Petitioner said this calmly but with a lot of anger.[9] The police and ambulance arrived and began extricating the victim. Deborah died within three to five minutes after the accident.

REASONS FOR DENYING THE PETITION

A. This Court lacks jurisdiction to determine whether the confrontation clause applies to "testimonial" evidence submitted at pre-trial hearings which form the basis for introducing alleged "inadmissible" evidence at trial.

Respondent urges this Court to deny the instant writ of certiorari based upon this issue because the statement of Melissa Tsolainos was never admitted at trial. The issues on appeal to the State First Circuit Court of Appeal were trial errors which did not include the admission of Melissa's statement at the pre-trial hearing. Melissa's statement at the pre-trial hearing was not assigned as error nor was it briefed

8. R. 2185

9. R. 2111

as required under State law. In Louisiana, issues that are not assigned as error and/or not briefed are considered abandoned on appeal. *State v. Bay*, 529 So. 2d 845 (La. 1988); *State v. Martin*, 550 So. 2d 568 (La. 1989). Petitioner mistakenly refers to the First Circuit Court of Appeal opinion as making reference to Melissa's statement in its final conclusion on the coconspirator's declaration. The First Circuit said, "From our review of this record, we find that the contested statement in the instant case was a coconspirator's statement with referential 'indicia of reliability.'" The "contested statement" clearly refers to the taped statement between Branigan and Tinker that was at issue in the assignment of error. The First Circuit at this point was merely acknowledging and verifying the criteria under *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed .2d 597 (1980), prior to that case's reversal.

Under Article 3 of the United States Constitution, the exercise of federal judicial power depends on the existence of a case or controversy. *Liner v. Jafco*, 375 U.S. 301 (1964). As set forth above, the issue of Melissa Tsolainos statement to the police was not in controversy at the state court level and therefore does not form a case or controversy before this Court. A ruling by this Court would clearly be an advisory opinion or an abstract proposition of law based on a matter that has not been fully litigated in the state court. For these foregoing reasons, respondent respectfully suggests that this Court should not grant this writ based on the first issue.

Nonetheless, this Court should deny this issue on the merits. Melissa's statement to the police was used at the pre-trial hearing to establish the purposes of the pre-trial hearing, whether there was a conspiracy. Hearsay evidence, like Melissa's statement, may also be used to establish probable cause. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317,

76 L. Ed. 2d 527 (1983). Hearsay is allowed as a res gestae statement, that is a statement made as a spontaneous utterance or declaration within a short period of time before or after the commission of the crime. Hearsay statements are also admitted in pre-trial hearings to show a state of mind regarding the declarant to determine the admissibility of other statements or evidence in a motion to suppress. *State v. Sheppard*, 371 So. 2d 1135 (La. 1979). Moreover, the admission of Melissa's statement at the pre-trial hearing was used to determine the *prima facie* case as allowed under the C.E. Art. 104(A) and *State v. Myers*, 545 So. 2d 981 (La. 1989). Melissa's statement was one of several pieces of evidence used at the hearing to establish a *prima facie* case for a conspiracy. It was not introduced at trial and therefore did not taint the jury or violate defendant's right to confrontation.

In his testimony at trial, Detective Bobby Juge said that he took the taped statement from Panos on July 7, 1998 and also a taped statement from Melissa.[10] Nothing further was said about the substance of Melissa's taped statement.[11] The jury heard the taped statement of defendant made after his arrest on the conspiracy charge. The jury had no further information regarding Melissa's statement to Juge. Therefore, there is nothing for this Court to review. However, if this Court would find that Detective Juge's reference to Melissa's statement was error, it was harmless error in view of the implications of Panos' statement played for the jury. In his statement, Panos Tsolainos, Melissa's father, implicated her

10. Det. Juge also testified that he interviewed Gerald Branigan and Melody Johnson prior to issuing warrants for Panos and Melissa. R. 2377

11. R. 2381

as having introduced him to Branigan for the specific purpose of murdering his ex-wife. Clearly, even if the Detective's neutral reference to Melissa's statement was some sort of error, it was harmless error in light of the evidence at trial. Petitioner presents no viable issue for the Court to review in this Question.

B. The tape-recorded conversation of Mr. Schmolke and Mr. Branigan was statements in furtherance of a conspiracy and under *Crawford* not subject to the Confrontation Clause scrutiny.

Petitioner asks this Court to grant this writ and determine that any statements made in furtherance of a conspiracy that included a police informant, or someone who had contacted the police regarding the conspiracy, should fall within *Crawford's* minimal definition of "testimonial evidence." If this Court extends the definition of *Crawford* to include what defendant terms as ex parte testimony of a police informant who gets paid for results, it will eliminate many co-conspirators' statements as hearsay exceptions and radically change the jurisprudence in this area.

Crawford v. Washington, 124 S. Ct. 1354 (2004), specifically defined the core class of "testimonial" statements. It limited the applicability of the Confrontation Clause to statements constituting "testimony." The definition included both "in court" testimony and its "functional equivalent," such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine, and "similar pre-trial statements that the declarants would reasonably expect to be used prosecutorially." *Crawford v. Washington*, *supra.* Statements taken by police officers in the course of interrogations are also testimonial under even

a narrow standard according to *Crawford*. For these aforementioned types of statements to be admissible, the *Crawford* Court made it clear that the declarant must be unavailable to testify and the defendant must have had a prior opportunity to cross examine the declarant. The *Crawford* Court made it clear that it would leave for another day any effort to spell out a comprehensive definition of testimonial. The day has not arrived with this case.

In discussing the principals behind the application of the Confrontation Clause to statements, this Court specifically mentioned two additional kinds of statements that by their nature are not testimony: business records and statements in furtherance of a conspiracy. These types of statements are clearly non-testimonial hearsay and are governed by the state's hearsay statutes.

In this case, the State introduced testimony concerning a prior incident in which the defendant participated in a conspiracy to kill the victim. Charles "Tinker" Schmolke, a confidential informant, contacted Detective Scallan of the St. Tammany Parish Sheriff's Office and divulged that Gerald Branigan had approached him and asked for his assistance in killing someone. According to Schmolke, Branigan was introduced to Tsolainos by Tsolainos' daughter Melissa. Tsolainos was willing to pay someone to kill his ex-wife, Deborah. Schmolke agreed to wear a Kell recording device that could be monitored by Scallan for the next meeting. That afternoon, on June 30, 1998, Schmolke, wired with the Kell device, went to the residence that Branigan shared with his girlfriend Melody Johnson and talked about the details of the conspiracy. The recording made at this meeting is the taped statement played for the jury. There were two more meetings that were not recorded because of technical failure

with the recording devices. Although Scallan was able to hear the conversations of all three meetings, he was only able to record the first meeting. The Judge excluded from introduction at trial any information from the other two meetings that were not recorded.

This recording established that Branigan was to be paid five thousand ($5,000.00) dollars for accomplishing the murder. He agreed to share twenty-five hundred ($2,500.00) of it with Schmolke. The two men would have to travel to St. Louis, Missouri, because the intended victim was a recovering heroin addict living there with her mother. The men agreed that they were going to fake an "O.D." of the intended victim. *See* Appendix A.

This tape-recorded statement is clearly statements in furtherance of a conspiracy and allowable under State law both under C.E. Art. 404B(1) and Art. 801(D)(3)(b). To exclude these statements because the declarant had talked to the police or was labeled a "police informant" would not serve any clear purpose of the Confrontation Clause. The Confrontations Clause's ultimate goal is to insure reliability of evidence as a procedural rather than a substantive guaranty. As this Court said in *Crawford*, the clause reflects a judgment not only about the desirability of reliable evidence but about how reliability can best be determined. The presence of a person that has spoken with the police or is labeled as a police informant does not move the statements into the realm of testimonial evidence. This is not the same sort of situation as a custodial interrogation, a preliminary examination, or a grand jury questioning. The reliability of statements covered by the Confrontation Clause is not enhanced by the inclusion of the taped conversation between Schmolke and Branigan in

the definition of "testimonial evidence" because Schmolke talked to the police and was wired for monitoring and taping.

Respondent urges this Court to continue the jurisprudence and history that states that hearsay statements of coconspirators are sufficiently reliable not to violate the Confrontation Clause under *White v. Illinoise*, 502 U.S. 346, 112 S. Ct. 763 (1992). Hearsay rules and the Confrontation Clause are generally designed to protect similar values. *Bourjaily v. United States*, 483 U.S. 171, 183, 107 S. Ct. 2775 (1987). This court has reiterated that the co-conspirator exception to the hearsay rule is firmly rooted in our jurisprudence. The statement herein, is just such a hearsay exception. Schmolke contacting the police does not change the characterization of the taped statement as co-conspirator statements.

C. This Court does not need to consider whether the Confrontation Clause imposes an absolute bar to a police informant's testimony absent a prior opportunity for cross examination because the testimony at issue is part of a taped statement in furtherance of a conspiracy and not isolated for consideration.

The petitioner in this case asks this Court to make clear that the general reliability exception in *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531 (1980) no longer survives *Crawford*, even as to non-testimonial evidence. In order to do this, the petitioner asks this Court to lift a police informants testimony out of context from the taped conspiracy statement and apply Sixth Amendment analysis to establish a new rule that would absolutely bar that testimony absent prior opportunity for cross-examination.

Mr. Schmolke came to the police with information that Gerald Branigan contacted him and requested that Schmolke participate in a killing for hire instigated by Panos Tsolainos. The "police informant's testimony" referred to in this section by petitioner is the taped conversation that Schmolke had with Branigan after Schmolke contacted the police. This taped conversation was a statement of two people in furtherance of a conspiracy. Schmolke's testimony cannot be isolated. The discussion must center around the taped conversation between Branigan and Schmolke and not just Schmolke's part of the conversation.

In this issue, petitioner attempts to focus the Court's attention on Schmolke alone. Petitioner even makes a personal attack on Mr. Schmolke's character with a litany of negative personality traits, including drug use and reference to a criminal history. Petitioner fails to point out to the Court that the co-conspirator in the statement, Gerald Branigan, was in fact convicted of conspiracy to commit murder. The issue here is the taped statement between Schmolke and Branigan. The analysis for this Court must focus on the entire taped statement itself and not the isolated words of one co-conspirator.

The focus must remain on the conversation between two people, Schmolke and Branigan. The taped statement was a Kell tape that recorded the conversation of Schmolke, Branigan, and Melody Johnson, Branigan's girlfriend, at Johnson's house. The conversation verified that Schmolke was solicited to participate in the conspiracy to kill Deborah Tsolainos.[12] There was ample evidence of acts in furtherance of this conspiracy: an agreement on the price of the killing;

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12. R. 2257

an agreement concerning the method to use; an agreement on a signal for a safe return of Branigan and Schmolke from St. Louis to Louisiana following the homicide; Panos' agreement to provide Branigan and Schmolke a picture of Deborah.

Moreover, petitioner admitted in the taped statement to police after his arrest on the conspiracy charge, that he and Branigan had several conversations during which they established a price and a method for the murder. They also devised a plan to protect the perpetrators from returning to St. Tammany Parish if the plan to make the death appear accidental went awry. As the First Circuit's opinion pointed out, petitioner's statement alone supported the existence of a conspiracy between petitioner and Branigan. Then the recorded conversation between Branigan and Schmolke verified the existence of a conspiracy and presented positive acts in furtherance of that conspiracy.

It must also be noted that when Branigan first contacted Schmolke to help him kill Deborah, Schmolke was not acting as a state agent and not a police informant at that time. It was Schmolke who went to the police not the reverse. Schmolke's statements made on the Kell tape cannot be isolated in order to make new law or expand the definition of "testimonial evidence." This Court should not isolate one side of a conversation in order to establish new parameters for the Confrontation Clause.

This recorded statement must be analyzed as a whole without isolating the individuals. It is clearly a statement of coconspirators that resides outside of the parameters of *Crawford* and not included in the definition of "testimonial evidence". This writ should not be granted for this issue.

D. This Court should not extend the Confrontation Clause to statements in furtherance of a conspiracy, now admissible under C.E. Art. 801(D)(3)(b), to exclude them from trial if they cannot pass a reliability test and be subject to cross examination.

In this issue, petitioner is asking the Court to extend the Confrontation Clause to statements of coconspirators and apply a reliability test. Petitioner proposes that after a determination is made that a coconspirator's testimony is admissible as a firmly rooted hearsay exception, it should then be tested for its inherent reliability and only be admitted with cross-examination. Petitioner asks this Court to return to its concerns in *Crawford* and add a second test to look at the subjective indicia of reliability that he claims would overcome any presumption of reliability generally afforded by a firmly rooted hearsay exceptions. Thus, petitioner wants this Court to reestablish a test relevant to reliability as denounced in *Crawford*.

Petitioner erroneously claims that the State's evidence of the conspiracy in this case was dependent entirely on Branigan/Schmolke tape recorded conversation. However, Petitioner's own statement after his arrest for conspiracy to commit murder corroborated Branigan's assertions to Schmolke that Panos solicited him to kill Deborah Tsolainos. Branigan's solicitation of Schmolke to assist him in the murder was another "overt act" necessary for the furtherance of the conspiracy. Conspiracies are made up of statements of coconspirators. A *prima facie* case of conspiracy is presented when the State introduces evidence which, if unrebutted, would be sufficient to establish facts of a conspiracy. *State v. Lobato*, 603 So. 2d 739 (La. 1992). Moreover, the statements made by coconspirators which are the object of

defense counsel's hearsay objections are considered by the trial court in making its determination as to whether a *prima facie* case of conspiracy has been established. *Prima facie* cases are generally made using hearsay statements by witnesses and/or coconspirators.

Moreover, *Bourjaily v. United States*, supra, reiterated the bootstrapping rule of *Glasser v. United States*, 315 U.S. 60 (1942) and *United States v. Nixon*, 418 U.S. 683 which established that in determining preliminary questions concerning admissibility, the Court is not bound by the rules of evidence, thus, authorizing consideration of hearsay. The *Bourjaily* court rejected a per se rule barring the consideration of coconspirator statements during preliminary fact finding and stated that such a rule was not required. Like the statements in *Bourjaily*, the coconspirator statements in the tape-recorded statements here were verified by other events that transpired in the meetings that culminated with the arrest of Panos, Branigan, and Melissa for conspiracy to commit murder. Furthermore, the *Bourjaily* court reiterated the jurisprudence that if the statements are admissible under the federal rule of evidence, Rule 801(d)(2)(E), there is no constitutional problem.

In this issue, petitioner wants the Court to eliminate a hearsay exception that covers statements that by their very nature are not testimonial. *Crawford* said that these particular hearsay exceptions were not testimonial evidence and not subject to the Sixth Amendment Confrontation Clause. Petitioner is asking this Court to back out on its holding in *Crawford* and redefine statements by co-conspirators.

Petitioner also continues to return to the First Circuit's statement that said, "From our review of this record, we find

that the contested statement in the instant case was a coconspirator's statement with the referential 'indicia of reliability.' Thus, its admission into evidence was not a violation of the confrontation clause." Petitioner wants this Court to grant the writ because of the First Circuit's reference to "indicia of reliability." The statement was acknowledged by the First Circuit as a coconspirator statement that is firmly rooted as a hearsay exception. The additional comments by the First Circuit that refer to the "indicia of reliability" do not affect the character of the coconspirator's statements themselves. Because this opinion was written prior to the decision in *Crawford*, the Court, in an abundance of caution, referred to the reliability test in *Ohio v. Roberts.* Nonetheless, the character of the statement is not changed by the comments of the First Circuit Court of Appeal. This issue does not provide the Court a reason to grant this writ.

CONCLUSION

It is not necessary for the Court to grant this petition for writ of certiorari, nor is the alternative, plenary review, necessary. The Louisiana Court of Appeal for the First Circuit opinion more than adequately covers the issues raised by this writ and its opinion, even in light of *Crawford,* can be maintained under constitutional scrutiny.

Respectfully submitted,

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APPENDIX A — TRANSCRIPT OF JUNE 30, 1998 TAPED MEETING

ITEM # 7-0318-98

Date: 6/30/98
Time: 1550 - 1605 hours

(Conversation of Gerald Branigan, Tinker Schmolke and Melody Johnson)

Set up:

Detective Artigue: It's a pretty long way down here, man, from where you are.

Tinker: It's a little bit before that stop sign beyond the road about half way between the road and the stop sign.

Detective Artigue: Oh, that looks like that thing you do the windshield wipers . . .

Tinker: That's good right here . . .

Detective Artigue: Alright, I'm dropping him off, you got the tape running?

Tinker: Yeah.

Detective Artigue: I'm dropping him off at ten minutes to, it's 6:30.

Appendix A

Tinker: Alright, I'll meet you all back here in what?

Detective Artigue: Meet me back here when you are finished.

Tinker: Alright.

(Walking)

(Knocking on door)

Melody: (answers) Tinker, how's it going?

Tinker: Where is he?

Melody: Come in.

Gerald: Hey.

Tinker: Hey.

Gerald: What's up?

Tinker: Nothing on call. What's your name bro?

Gerald: Gerald, bro.

Tinker: Gerald?

(Inaudible)

Appendix A

Tinker: (inaudible) . . . yeah, but I kicked the habit

(inaudible) . . . my Dad's at the graveyard

(inaudible) . . . but uh, I want to talk to you, bro . . . what's the deal?

(inaudible) . . . that's about right

Tinker: How the fuck are we going to get there?

Gerald: Well, he's putting up $2500 cash first, and another $2500 . . .

Tinker: Cause I want some of my funds up front so I know I ain't getting fucked.

Gerald: Well, listen, he's going to put $2500 cash up front.

Tinker: Not me, I like to know a little bit about what's going down, I mean what the fuck, we going fucking, we going fucking, this bitch is gonna disappear off the face of the earth?

Or is she going to fucking . . .

Gerald: We're gonna OD her ass.

Tinker: OD her ass?

Gerald: She's a heroin addict, so I figure we're gonna OD that mother fucker. The old man wouldn't call him. . . .

Appendix A

Tinker: I called him last night at 12:00. I need the money. . . .

(inaudible)

Tinker: I'm not supposed to. . . .

Melody: (inaudible)

Tinker: Well, I got my lawyer in the process of doing all that and everything, you know, but uh. . . .

Gerald: That's it, where Charlene's Cajun, huh?

Tinker: What happens if these niggers got guns? Huh?

Gerald: This is his old lady, his ex-wife, she lives all by herself. She lives by herself.

Tinker: She ain't gonna have no guns, or nothing, we ain't got to worry about that.

Gerald: No, supposedly, he's supposed to give me some pictures with some information where she's at, where she hangs out at, . . .

Tinker: Cause I won't go in there all blind folded and shit. Bro, when I go in there, when I go to do this job, I want to do it right.

Gerald: Well, supposedly there ain't nothing to it, her mother's daughter is out of the picture, his daughter's moved back down here. So it ain't gonna be no problem.

Tinker: Well, I don't want nothing with her daughter.

Gerald: Yeah. She ain't gonna be there. Yeah, she's 20 something years old, she moved. She already moved back to New Orleans, so there's ain't nothing but her momma there. So that's why I thought. . . .

Tinker: No, I'm thinking more along the lines, bro, you can pay me off cheap, 3, $3,000, and I'd like at least $250, $500 up front.

Gerald: You telling me tonight, bro, you want $2500 straight up front?

Tinker: Split that with me, and we'll do some business. I want the money I wanna see, bro. Cause I ain't going to do no job for nobody unless I'm getting paid.

Gerald: We'll split $2500 but if you want to come, we can both go up there and go.

Tinker: Look, I'm game bro. My old lady is giving me more shit, I wasn't gonna do it bra, but as I showed you I come over eat your shit, stuck a knife in your fucking throat, so you know we can fucking do this. After you pulled that switchblade on me, I mean, that's all good, tho, but we can go do this.

Gerald: Yeah, I'm gonna talk to him tonight brother, and we can sure will. I called him last night and he's way in Marerro, he lives up here somewhere. In fact, he bunks here, he's got money coming out his ass.

Tinker: He got more money than he knows what the fuck to do with.

Gerald: I told him straight up, you know what, sorry about that but I want $2500 up front and $2500 when I come back. He said go.

Tinker: You only getting paid five? I thought you said seven.

Gerald: No, he's giving me $5,000 grand to do the job.

Tinker: Oh so you were going 25 slipped him. I ain't trying to get in your business or nothing, but what's the bitches' nanny, or do I need to know all that?

Gerald: I don't know her first name, but her last name is Tsolainos, probably Greek.

Tinker: Tsolainos?

Gerald: Yeah. She's got a fucking track all the way up and down her arm, supposedly fuck, she's a heroin addict. . . .

Tinker: So she needs to be popped.

Gerald: Yeah, she needs a little extra dope that's all. We can put her out cause she's trying to fuck with the kids and shit, trying to take them all away, and fuck, taking all kind of money that he's got and shit, and he said fuck it. I just as soon give her that fucking dose send her on and say goodbye.

Tinker: Hahaha. I hear you, bro. Ain't nothing to it.

Gerald: I'm gonna call tonight, bro. I gotta go with her Daddy on a tugboat tomorrow. But I'm only staying for one day. And uh, I'll be back. So if I don't have to go to work. . . .

Tinker: I want more. I want some more information on this deal, bra. I want to know as much as you know.

Gerald: Oh yeah, you'll know everything. . . .

Tinker: I don't need, I don't need to know the dude but that would be nice. You know what I'm saying, but I don't want to go in there blindfolded, baby.

Gerald: Well, yeah.

Tinker: Cause I don't want to be blindsighted.

Gerald: I don't want to go in there blindfolded either. I said I want to know where she lives at, where she hangs out at. . . .

Tinker: I want to know how many times a day that bitch takes a shit, I want to know everything.

Gerald: How much fucking dope she does a day, that close . . . if she does a fucking couple of hundred dollars of heroin a day, we can really knock that mother fucker off.

Tinker: St. Louis?

Gerald: Huh? Yeah, she's in St. Louis

Appendix A

Tinker: How far is St. Louis from this mother fucker? It's a good ride.

Gerald: A good ways, I figure we could catch a bus up there.

Tinker: Catch a bus?

Gerald: Yeah, catch a Greyhound bus. We could go up there and ride around, mother fucker, take care of her, get rid of the mother and come back. At first I thought. . . .

Tinker: I thought about it the other day when I told you no, but you just kind of caught me by surprise, you understand, I didn't know what to expect. I didn't know what it stuck to, dig?

Gerald: Yeah, I'm supposed to get all kinds of pictures and shit tonight, either tonight, or. . . .

Tinker: If you get the pictures, I want to see some of them too. So I know who I am going to get, straight up. But I don't need to know, you know. . . .

Gerald: I'd like to have somebody to come with me anyway, watch my back while I sit there.

Tinker: Alright, bro, well let me get back around here then.

Gerald: I'm a go get on my highway after while, but I gotta go I'm waiting for her Momma and Daddy to get back . . . (inaudible) knew I was coming. . . . Take care.

Tinker: Yeah, we'll go do this, bro. You gotta let me know. Those pictures. . . .

Those pictures and cash . . . gotta see those pictures. . . .

Gerald: Yeah. Cool then.

Tinker: Alright. See ya later.

(leaves, walking)

Tinker: Sound good enough for you?

Detective Artigue: Huh?

Tinker: Sound good enough for you?

Detective Artigue: I couldn't hear it, tell me what he said. Leave that on, tell me what he said.

Tinker: He said, I told him, he said $2500 up front, and I told him I want half of that and last name, he got that on the recorder, I don't remember it, she's uh, Greek, he wants us to OD her, so he's gonna give us $2500 up cash, up front, up cash up front, and the other $2500 after it's done.

Detective Artigue: So you ain't gonna get $5000 for the deal?

Tinker: No, I'm gonna get $2500.

Detective Artigue: I thought you said he's gonna give you $2500 and $2500.

Tinker: Well, that's what he told me. I thought he didn't mean it. He told me at first $7,000 so I figured I had to say, bra, you are gonna have to at least break me off three. . . . I mean, but he said "No, I'm getting paid $5,000 for the whole job", I was like oh, alright. Well, then he said uh, I said well, 25, 25, 50/50, I said that will work. He said we'll fucking uh, take a bus up there, and we'll fuck with the money we got we'll buy a cheap little piece of shit car, and we'll get pictures and shit tonight of her and so I can get the car information place.

Detective Artigue: Where are you going to get pictures of her, from the husband?

Tinker: Un, Panos, that's her husband.

Detective Artigue: Her husband is here in town?

Tinker: Uh, I don't know. Honestly, that I don't know. All he said is we getting pictures .. . can't do this at the Time Saver brother, I mean people know me. . . .

Detective Artigue: You gotta keep going, John.

John: I'm trying to get out of here now.

Detective Artigue: Do it.

Tinker: But uh, sound like a real deal.

Detective Artigue: But he wouldn't give you any money up front.

Appendix A

Tinker: He said the dude is supposed to be bringing the $2500 tonight.

Detective Artigue: Tonight?

Tinker: Tonight.

Detective Artigue: And the pictures?

Tinker: And the pictures, and I told him he had to give me $1250. He says he's going on the boat for one night with this old lady's dad, and he'll be back tomorrow. And he'll give me my $1250 and show me the pictures and shit . . . well, that might be tonight I'll be getting all that information for you.

Detective Artigue: If he's going on the boat tonight, you ain't gonna get it.

Tinker: Yeah, baby, but whatever I need and everything, he's gonna get the pictures. His name is Gerald.

Detective Artigue: This guy here?

Tinker: Yeah.

Detective Artigue: Gerald what?

Tinker: He didn't go into all that. I didn't want to pry too much.

Appendix A

Detective Artigue: Got enough? Yeah, shut it off.

Tinker: Huh?

Detective Artigue: Time now is 4:00 o'clock.

This tape revised on 10/7/99 mmp

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PANOS T. TSOLAINOS,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
LOUISIANA COURT OF APPEAL
FOR THE FIRST CIRCUIT

REPLY BRIEF

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The State's legal arguments suggest that this case involves a conspiracy conviction. The State never tried Mr. Tsolainos for allegedly conspiring to kill his ex-wife by hiring a hit man and in fact dropped those charges. The State rather tried Mr. Tsolainos for second degree murder when Mrs. Tsolainos tragically died in a car accident while Mr. Tsolainos was driving.[1] The State's entire case of proving Mr. Tsolainos had the requisite intent to kill Mrs. Tsolainos in the car accident consisted of the alleged conspiracy to hire a hit man. Without the alleged conspiracy, the State had no second degree murder case. Mr. Tsolainos however could not confront the alleged conspiracy presented against him, which included the out-of-court statements of three witnesses, because those witnesses either pled the Fifth Amendment or committed suicide before trial. This case presents the opportunity for this Court to consider several critical issues under the Confrontation Clause of the Sixth Amendment.

A. This Court should determine whether the Confrontation Clause applies to "testimonial" evidence submitted at pre-trial hearings which form the basis for introducing otherwise inadmissible evidence at trial.

Contrary to the State's argument, Melissa's statement was clearly in controversy at the state court level and this Court does have jurisdiction to consider it. Petitioner objected at the pre-trial hearing to the introduction of all of the out-of-court conspiracy evidence, including Melissa's statement, and sought immediate review of the trial court's adverse ruling to both the court of appeal and the Louisiana Supreme Court. Although the State later chose not to introduce Melissa's statement directly at trial, and so Mr. Tsolainos could not lodge an objection specifically to it, Mr. Tsolainos objected at trial to

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1. Mr. Tsolainos presented uncontroverted scientific evidence at trial that this was an accident. The State's own forensic expert also testified that Mrs. Tsolainos had no physical signs of being hit in the abdomen by the car, as the State contended, and that she had been drinking on the day in question. Mrs. Tsolainos also called Mr. Tsolainos to come to the house on the day in question to pick up the belongings. And, while the State relied heavily on the testimony of Clarissa Tsolainos and George DeForest, Clarissa admitted in a new trial hearing that she lied at trial and offered Mr. DeForest $20,000 or a new truck for his testimony.

the introduction of all of the other conspiracy evidence. Mr. Tsolainos also appealed the trial court's admission at trial of all of the submitted conspiracy evidence which was only admissible because of the foundation laid at the pre-trial hearing, which included Melissa's statement.[2] This issue is clearly ripe for consideration by this Court.

Turning to the merits of the State's arguments, the State asserts that because it did not introduce Melissa's statement at trial but allowed Det. Juge to refer to it does not implicate Mr. Tsolainos' Sixth Amendment right. The State omits however that Det. Juge also testified that he relied on that statement in arresting Mr. Tsolainos. The clear implication of Det. Juge's testimony was to associate Mr. Tsolainos with the alleged conspiracy through Melissa's statement. His testimony therefore had the same effect as introducing Melissa's statement to say Mr. Tsolainos was involved in the conspiracy. Mr. Tsolainos was clearly denied his Constitutional right to cross-examine that testimonial evidence because Melissa was unavailable at trial.

Should this Court find that Mr. Tsolainos was denied his right to cross-examine Melissa at trial, the State's back-up argument is that Constitutional violation was harmless error in light of the other evidence at trial, namely Mr. Tsolainos' statement. Because of the fundamental nature of this Sixth Amendment right as discussed in *Crawford* and the unpredictability of applying an amorphous test to excuse adherence to that right, *Crawford* raises (or re-raises) the question as to whether any violation of this Sixth Amendment right can ever be considered harmless, particularly when that evaluation is based on yet another equally amorphous standard. Even if harmless error applies, that standard is not whether the other evidence submitted is sufficient to support the verdict. *Satterwhite v. Texas*, 486 U.S. 249, 258-59, 108 S. Ct. 1792, 1798, 100 L. Ed. 2d 284 (1988). The proper analysis is whether the State has proved beyond a reasonable doubt that the error did not contribute to the verdict. *Id.* First and foremost, the State repeatedly referred to Melissa as a co-conspirator (at trial and in its brief here) although the totality

2. *See* Mr. Tsolainos' Petition for Writ of Certiorari, pp. 11-14.

of the evidence showed that she was never one. Additionally, while the State attempts to ameliorate the admission of Melissa's statement with Mr. Tsolainos' statement, Mr. Tsolainos only admitted to speaking to Mr. Branigan but denied pursuing anything further.[3] The remainder of the alleged conspiracy evidence was the out-of-court statements of the three witnesses. Moreover, the State did not use this evidence for the purpose of proving the alleged conspiracy, which, by any logical measure, was discontinued (if it ever existed) with the arrests of Mr. Branigan, Mr. Tsolainos and Melissa. The State rather offered that evidence to prove Mr. Tsolainos' state of mind three weeks after the arrest with respect to a death which bore no similarity to the alleged conspiracy, and Mr. Tsolainos was precluded from confronting those witnesses, including Melissa, on that issue. Whether harmless error even applies, much less exists, here is highly questionable. This Court ought to consider those issues or at a minimum remand this case to the lower court for those determinations.

To the extent Det. Juge's reference to Melissa's statement at trial, rather than the actual admission of her statement, would not violate Mr. Tsolainos' Sixth Amendment right under *Crawford*, Mr. Tsolainos also urged this Court to consider whether *Crawford* extends to testimonial evidence admitted at pre-trial hearings. The State's only response to this issue is that hearsay has been accepted before in pre-trial hearings. The State's response begs the question. Prior to *Crawford*, trial practice also permitted the introduction of testimonial hearsay evidence without cross-examination. This Court changed that in *Crawford*. The State provides no argument at all on whether *Crawford* also changes, or should change, pre-trial practice as it previously existed. For all of the reasons set forth in Mr. Tsolainos' Petition, this Court should consider this issue.

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3. Mr. Tsolainos also never stated that Melissa introduced him to Mr. Branigan for the purpose of hiring a hit man, as the State asserts. He was introduced to Mr. Branigan (a drug dealer) when, at a very difficult time in Mr. Tsolainos' life, he unfortunately lapsed into drug use, and contrary to the State's assertion, the State did introduce Mr. Tsolainos' prior drug use at trial, over defense objection which was supported by the State's own expert's opinion that it was irrelevant.

B. This Court should determine whether a police informant's out-of-court testimony constitutes "testimonial" evidence and thus, under *Crawford*, is subject to Confrontation Clause scrutiny.

The State's contention that Mr. Schmolke's out-of-court testimony does not constitute "testimonial" evidence is based on two faulty premises. First, while the State admits that Mr. Schmolke was a police informant, the State characterizes him as a co-conspirator. Mr. Schmolke was clearly not a co-conspirator. There is absolutely no evidence in the record that Mr. Schmolke ever agreed to participate in the alleged conspiracy even before contacting the police. Moreover, at the time of the recording, he was clearly working with and at the direction of the police. Notably, the trial court did not admit Mr. Schmolke's out-of-court testimony at trial on the basis that he was a co-conspirator, and the court of appeal specifically stated that Mr. Schmolke was not a co-conspirator.[4] To the extent the State is arguing that a police informant nevertheless qualifies as a co-conspirator, that imaginative issue itself should warrant this Court's review of this case.

Second, the State submits that the recorded conversation between Mr. Schmolke and Mr. Branigan must be analyzed as a whole without isolating each side of the conversation. The State surely is not advocating that as long as one individual's statements in a conversation are non-testimonial evidence (or admissible under a hearsay exception) the statements of the other party to the conversation automatically are classified the same. The State of course provides no legal support for that position although it interchangeably discusses Mr. Schmolke's and Mr. Branigan's statements in the taped conversation. The focus here is on Mr. Schmolke's statements, not on Mr. Branigan's (which are discussed below). If it is the State's position that Mr. Schmolke's statements are automatically non-testimonial and admissible because Mr. Branigan's (arguably) are, that imaginative issue also should warrant this Court's review of this case. The State however is likely arguing in support of the trial court's ruling which admitted

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4. *See* Mr. Tsolainos' Petition for Writ of Certiorari, p. 13, n. 21.

Mr. Schmolke's statements on the basis that it was not hearsay because it was not offered to prove its truth but only to put Mr. Branigan's statements in context. The error in that argument is the basis on which Mr. Schmolke's statements were admitted is irrelevant. The question presented is whether they constitute "testimonial" evidence and thus, under *Crawford*, cannot be admitted for any reason without cross-examination.

Once the State's faulty premises are laid bare, the State does not address that issue at all. For all of the reasons set forth in Petitioner's Petition, this Court should consider that issue.

C. Even if a police informant's testimony constitutes "non-testimonial" evidence, this Court should consider whether the Confrontation Clause imposes an absolute bar to police informant testimony absent a prior opportunity for cross examination.

The State again does not address this issue at all but reverts to its erroneous premises that Mr. Schmolke was a co-conspirator and that Mr. Schmolke's statements cannot be considered separately from Mr. Branigan's. Again, should the State be advocating for two imaginative theories of law here, this Court should grant this writ application to consider those issues as well.

The only possible argument which might otherwise be deciphered from the State's brief is that Mr. Schmolke's statements were reliable and thus properly admitted. While that conclusion is subject to serious dispute (as discussed below), it misses the point. In *Crawford*, this Court was concerned with the process for assessing reliability:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability."

Id. at 1370.

The State here does not address why the Framers nevertheless meant to leave the Sixth Amendment protection of *non-testimonial* evidence to those misgivings. The State also

ignores the multiple, different reasons that the trial court (at the pre-trial hearing and at the trial) and the appellate court provided for admitting Mr. Schmolke's statements, which similarly existed in *Crawford* and underscored this Court's revelation: "*Roberts*' failings were on full display in the proceedings below." *Id.* at 1372. The State instead focuses solely on justifying the lower courts' decisions, even though this Court concluded in *Crawford* that neither the "vagaries of the rules of evidence" nor the "amorphous notions of 'reliability'" is the controlling standard:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id. at 1370.

This Court further recognized in *Crawford* that the use of a reliability balancing test not only was so unpredictable but also resulted in the admission of testimony the Confrontation Clause clearly intended to exclude. *Id.* at 1371-72. Applying such a balancing test in this case exposes the same amorphous, if not entirely subjective, notions of reliability, even while the State advocates that Mr. Schmolke's statements were properly admissible because they were reliable. As previously noted in Mr. Tsolainos' Petition, the evidence presented on Mr. Schmolke's reliability (or lack thereof), particularly from the State's own police officer, was uncontroverted and overwhelming.[5] For obvious reasons, the State therefore attempts to shift the focus from Mr. Schmolke, although his statements are at issue, and asserts that Mr. Tsolainos fails to point out that Mr. Branigan was in fact convicted of conspiracy. Equally compelling however, which the State ignores, is that Melissa was in fact found not guilty of those same charges. The State

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5. Mr. Tsolainos' Petition for Writ of Certiorari, pp. 22-23.

also attempts to bolster Mr. Schmolke's reliability by asserting that Mr. Tsolainos' statement alone supported the existence of a conspiracy between Mr. Tsolainos and Mr. Branigan and the recorded conversation between Mr. Branigan and Mr. Schmolke verified the conspiracy and presented affirmative acts in furtherance of it. As noted above, Mr. Tsolainos only admitted in his statement to speaking to Mr. Branigan and denied pursuing anything further. Nowhere in Mr. Tsolainos' statement does he discuss Mr. Branigan's solicitation of Mr. Schmolke nor was he a party to the tape recorded conversation between those individuals. Yet, the State used the recorded conversation as evidence of a conspiracy, including highly prejudicial comments attributed to Mr. Tsolainos, although that conversation went far beyond his statement and Mr. Tsolainos could not cross-examine Mr. Schmolke. Mr. Schmolke's statements were also not even used to prove the alleged conspiracy but were used for a completely different purpose on a completely different charge. Thus, this case presents serious questions about courts' individualized applications of a "reliability" exception to the Confrontation Clause, even as to non-testimonial evidence from a police informant, and provides this Court with the opportunity to consider whether that exception or the general rules of evidence should continue to govern that evidence.

D. This Court should consider whether an alleged co-conspirator's statement, which is premised solely on a hearsay foundation and is so inherently suspect, is nevertheless admissible without cross-examination simply because it might satisfy Code of Evidence article 803(D)(3)(b).

The State asserts that this Court held in *Crawford* that a co-conspirator's statement is not testimonial and thus is not subject to the Sixth Amendment's Confrontation Clause. The State also asserts that Mr. Tsolainos is asking this Court to apply a reliability test to a co-conspirator's statement after it is determined to be admissible as a firmly rooted hearsay exception. The State misunderstands both *Crawford* and Mr. Tsolainos' argument.

While Mr. Branigan's statement might be non-testimonial evidence, this Court did not hold that non-testimonial evidence is not subject to the Sixth Amendment. This Court only adopted an absolute bar to the admission of testimonial evidence, absent cross-examination, and specifically left open applying the Confrontation Clause to non-testimonial evidence. *Crawford*, 124 S. Ct. at 1370. Mr. Tsolainos also is not advocating imposing a reliability test after a hearsay statement is determined to be a co-conspirator's statement. Mr. Tsolainos rather was advancing the issue left open by this Court in *Crawford* where this Court's suggested that hearsay law might govern the admissibility of non-testimonial evidence because it inherently incorporates a reliability standard, at least with respect to "firmly rooted hearsay exceptions." This case raises the question as to whether the inherent presumption of reliability incorporated into the co-conspirator's exception to the hearsay rule exists here, considering the inherently unreliable nature of the out-of-court testimony, including Mr. Branigan's. And therefore, should this Court adopt an absolute bar to the admissibility of co-conspirator's statements absent a prior opportunity for cross-examination to avoid either, or both, "core confrontation violations" from occurring with the admissibility of inherently unreliable co-conspirator's statements or imposing a reliability standard on the admissibility of such statements which will also likely result in "amorphous, if not entirely subjective" determinations of reliability. Other than the conclusory retort that this Court should continue the jurisprudence that a co-conspirator's statement is sufficiently reliable, the State does not address these questions at all.

On the issues relating to the State's foundation for the alleged conspiracy, the State incorrectly asserts that Mr. Tsolainos claims that the State's evidence was dependent entirely on the hearsay conversation of Mr. Schmolke and Mr. Branigan. After which, the State then states that Mr. Tsolainos' statement corroborates Mr. Branigan's assertions to Mr. Schmolke that Mr. Tsolainos solicited him to kill his ex-wife.

Mr. Tsolainos clearly acknowledged that the alleged conspiracy evidence included not only Mr. Schmolke's and

Mr. Branigan's taped conversation but also Mr. Schmolke's comments to Det. Scallan, and Melissa's and Mr. Tsolainos' statements to the police.[6] Where Mr. Tsolainos and the State agree however is that Mr. Tsolainos' statement could only show, at best, the "agreement" stage necessary to establish a *prima facie* case of conspiracy. Thus, the only evidence to support the required "overt act" stage was the hearsay testimony. While this Court in *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) permitted the use of hearsay statements, this Court (contrary to the State's implication) specifically did not hold that hearsay evidence alone can provide the basis for proving a necessary stage for a *prima facie* case, without which a *prima facie* case does not exist. *Id.* at 181, 107 S. Ct. at 2781. Also contrary to the State's assertion that, like *Bourjaily*, Mr. Schmolke's and Mr. Branigan's statements were verified by other events, *Bourjaily* did not involve hearsay statements that were verified by other hearsay statements. In *Bourjaily*, the FBI informant who was part of the tape recorded conversation with the defendant's alleged co-conspirator and witnessed the meeting between the defendant and the alleged co-conspirator testified at trial and was subject to cross-examination there. *Bourjaily*, 781 F.2d 539, 541 (6th Cir. 1986). Here, neither Mr. Schmolke nor Mr. Branigan testified at trial and their statements could only be "verified" by each other's or by other hearsay evidence (such as Det. Scallan's repeating their conversation) because Mr. Branigan's solicitation of Mr. Schmolke is nowhere in Mr. Tsolainos' statement. Additionally, Mr. Schmolke's and Mr. Branigan's taped conversation contained several inaudible sections, the contents of which Mr. Tsolainos was precluded from ascertaining (and perhaps contained exculpatory evidence) because neither of those individuals could be cross-examined.[7]

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6. Mr. Tsolainos' Petition for Writ of Certiorari, p. 24.

7. Mr. Tsolainos was also deprived of ascertaining whether Mr. Schmolke and Mr. Branigan had any off-tape conversations, including whether they planned to create the incriminating tape against Mr. Tsolainos. For example, Det. Scallan testified Mr. Schmolke would be paid for results; what is more incriminating than this taped statement which is not subject to cross-examination?

Moreover, the State completely ignores this Court's cited decisions which provide that hearsay evidence must be reliable by virtue of its own trustworthiness, not by reference to other evidence at trial.[8] Thus, the issues of whether hearsay alone can establish a *prima facie* case of conspiracy and whether hearsay can be bootstrapped onto other evidence, especially other hearsay evidence, to establish its reliability are ripe for consideration by this Court.

CONCLUSION

This Petition for Writ of Certiorari should be granted. As an alternative to plenary review, this Petition should be granted, the judgment of the Louisiana Court of Appeal for the First Circuit vacated and this case remanded to that court for further consideration in light of *Crawford*.

Respectfully submitted,

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8. Mr. Tsolainos' Petition for Writ of Certiorari, p. 26.